161 U.S. 246

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~301~~. 52

HERMANN R. BALTZER AND WILLIAM G. TAAKS,
PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED SEPTEMBER 25, 1891.

(14,860.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 16, 1895.

1 Supreme Court of the United States of America.

HERMANN R. BALTZER and WILLIAM G. TAAKS, Plaintiffs in Error,
against
THE STATE OF NORTH CAROLINA, Defendant in Error.

To the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States:

The petition of Hermann R. Baltzer and William G. Taaks respectfully shows—

That on or about the twenty-eighth day of March, 1888, your said petitioners commenced an action against the State of North Carolina in the supreme court of the State of North Carolina upon a complaint of your petitioners setting forth and alleging as follows, viz:

I. That at the times hereinafter named said plaintiffs were partners doing business as bankers and brokers and negotiators of securities in the city, county, and State of New York.

II. That at the times hereinafter named "the Chatham
2 Railroad Company" was a corporation organized under the laws of and doing business in the said State of North Carolina and was recognized at all times by the said State as such a corporation; that by an act of the General Assembly of said State entitled "An act concerning the Chatham railroad amendatory of certain acts and authorizing a change of name," ratified the thirteenth day of December, 1871, the name of the said "The Chatham Railroad Company" was changed to "the Raleigh and Augusta Air Line Railroad Company," but that the identity of the said corporation was in no way changed and its powers and liabilities in no way altered by the said act.

III. That at the special session of the General Assembly of said State held in the months of July and August, 1868, an act was passed entitled "An act to amend the charter of the Chatham Railroad Company," ratified the 15th day of August, 1868, which act is hereby referred to and made a part of this complaint the same as if herein at length recited, wherein it was, among other things, provided that the public treasurer of the said State should deliver to the said railroad company coupon bonds of the State of North Carolina of one thousand dollars ($1,000) each to an amount not exceeding two million dollars ($2,000,000), the bonds bearing six per cent. interest, payable semi-annually, the principal payable at the end of thirty years from the date thereof, and further providing that before the said public treasurer should deliver any of the said two million dollars of State bonds to the said company the president of the
3 said Chatham Railroad Company should deposit with him coupon bonds of the said company for a like amount bearing the same interest as the said State bonds and same date, the princi-

pal and coupons payable at the same times and place, and that to secure the payment of the principal and interest of the said bonds of the said railroad company the said State should have a lien more effectually secured by a first mortgage upon certain property of the said railroad company therein mentioned, duly executed and registered, with power given to the board of internal improvement of the said State to enter upon and sell the said property in case of default so as to protect the State, and said act further provided that the said Chatham Railroad Company might at any time before maturity discharge its said bonds deposited with the said public treasurer by substituting in lieu thereof coupon bonds or other indebtedness of the said State or payment in national currency.

IV. That pursuant to the said act of August 15th, 1868, and on or about the 21st day of September, 1868, the said railroad company, by its proper officers, did execute and deliver under its corporate seal to the said public treasurer first-mortgage bonds of said company, dated October 1st, 1890, in amount two million dollars ($2,000,000), and also a first mortgage as security for the same, executed in the form and according to the terms of the said act; which said mortgage was thereafter duly registered, the record whereof is hereby referred to and made a part of this complaint the
4 same as if herein at length recited, and was a first lien upon the property covered by it and mentioned in the said act, and that said bonds were held on deposit by the public treasurer of the said State for the purposes named in the said act, and were subsequently returned according to its provisions, as hereinafter stated; that on or subsequently to the nineteenth day of October, 1868, said two thousand coupon bonds of the said State, numbered 1201–3200, inclusive, bearing date October 1st, 1868, each for one thousand dollars, were executed by the officials of the said State in the manner and form prescribed in and in accordance with the said act, and were thereupon delivered to the proper officers of the said railroad company, and that the said last-mentioned bonds are commonly known as "high-numbered" Chatham bonds, to distinguish them from another issue of State bonds also called Chatham bonds; that the form of each of said bonds, the number alone necessarily varying, is as follows:

UNITED STATES OF AMERICA.

No. 2801.

It is hereby certified that the State of North Carolina justly owes to —— —— or bearer one thousand dollars, lawful money of the United States, at the National Bank of the Republic, in the city of New York, on the first day of October, 1898, with interest thereon at the rate of six per centum per annum, payable half yearly at the said bank on the first days of April and October, in each year, from the date of this bond and until the principal be paid on surrendering the proper coupons hereto annexed.

In witness whereof the governor of the said State, in virtue of

power conferred by law, hath signed this bond and caused
5 the great seal of the State to be hereto affixed, and her public treasurer hath countersigned the same, at the seat of government of the said State, this first day of October, 1868.

W. W. HOLDEN, *Governor.*

Countersigned.
D. A. JENKINS,
Public Treasurer.

$1,000.

Issued under an act to amend the charter of the Chatham R. R. Co., ratified August 15th, 1868. [SEAL.]

That interest coupons were thereunto attached and were, save for dates and numbers necessarily varying, of the following tenor:

THE STATE OF NORTH CAROLINA

will pay to bearer, at the National Bank of the Republic, in the city of New York, on the first day of April, 1869, thirty dollars on bond 2801 for $1,000.

$30. D. A. JENKINS,
Public Treasurer.

V. That on or about the first day of September, 1868, before the said "high-numbered bonds" had been issued, the then president of the said Chatham Railroad Company, Dr. William J. Hawkins, met one John D. Whitford in New York and with him entered into negotiations to use State bonds in constructing the road of said company, and they applied to one John F. Pickrell, a broker in New York, to aid them; that a private contract for constructing the said road is alleged to have been entered into at this time by and between said Pickrell and the said company, but said
6 plaintiffs aver upon information and belief that the said contract was merely nominal.

VI. That early in the month of September, 1868, for the purpose of obtaining ten thousand tons of iron rails for the construction of the said road, the said company, through the said individuals, applied to certain persons doing business under the firm name of Schepeler & Co. to purchase from them the said iron, and said Schepeler & Co. being unable to secure the said iron themselves a certain contract was made by and between the said Pickrell, Schepeler & Co., and said plaintiffs, of which a copy was annexed to said complaint, marked Exhibit "A"; and a certain other contract was made by the said W. J. Hawkins, president of the said railroad company, of which a copy was thereto annexed, marked Exhibit "B," which contracts were thereby referred to and made a part of said complaint, the same as if therein at length recited, and the said contract "A," though nominally made with the said Pickrell, was in reality made with the said railroad company.

VII. That as provided in the said contracts and on or about November 2nd, 1868, three deliveries of iron were made by the plain-

tiffs, amounting to 2,104 tons of iron, for which said plaintiffs and their said associates became entitled to receive the sum of $167,097.73 in money, and that the said iron all went to the said railroad company and was used by it in the construction of its said road, and

7 that under the third and sixth sections of said contract, marked Exhibit "A," and under the provisions of the said contract marked Exhibit "B" said plaintiffs and said Pickrell and Whitford, as attorney- for Hawkins, joined in an order on the Continental National Bank of the City of New York (where bonds of the said State of North Carolina had been deposited according to the said contracts) for certain bonds to provide for the payment of the said debt; that thereafter the sum of $73,483.10 was paid in cash on account of said debt, and that on or about November 20th, 1868, one hundred of the said State bonds called "high-numbered" bonds as aforesaid, and on or about November 21st, 1868, fifty more of such bonds, in all one hundred and fifty bonds drawn from those so deposited as aforesaid were delivered to said plaintiffs on account of said balance of $93,615.57 so due them as aforesaid.

VIII. That said plaintiffs before receiving the said 150 high-numbered bonds had negotiated a sale for them, but that before the said sale could be closed, this issue of bonds was declared by the Stock Exchange of New York (where they had been listed as marketable bonds) to be unconstitutional and void, and were stricken from the list of marketable bonds, and that the said State of North Carolina has refused and still does refuse to recognize the validity of said bonds.

IX. That it has never been possible to realize the said balance of $93,615.57 from said bonds at any time since they were delivered to said plaintiffs.

8 X. That immediately upon said decision and declaration by the New York Stock Exchange said plaintiffs notified said Pickrell, Hawkins and Whitford that the said one hundred and fifty bonds were worthless and demanded payment of the said above sum in cash, but that said plaintiffs have not been able to obtain any settlement of this claim from the said persons, or from anybody, or any value for the iron thus delivered, except the said discredited bonds of the State of North Carolina.

XI. That the only reduction of this sum of $93,615.57 due for said iron was made by the repurchase of ten of said 150 bonds by said Pickrell for $6,150, leaving a balance unpaid of $87,465.57.

XII. That there has been no further payment or reduction of the said balance, nor has any interest been received thereon, nor have the plaintiffs collected or been able to collect the said sum of $87,-465.57 or any part thereof from any source, and that the said sum is still unpaid except as aforesaid.

XIII. That out of the total of said issue of 2,000 high-numbered bonds issued under the said act of August 15th, 1868, only three hundred and two bonds were ever negotiated, for the reason that they and the act creating them were considered void and unconstitutional, and the rest of said discredited issue, to wit, 1,698 bonds

remained in the possession of the said railroad company, and were returned to the said public treasurer, as hereinafter stated, without having been negotiated.

XIV. That all the bonds thus negotiated were negotiated at the full market value of valid securities of the same character, and the said railroad company and the said State received each its full benefit accordingly, and that the same appears by the report of the Senate Investigation Committee Document 33 of the session of 1869–1870, which is hereby referred to and made a part of this complaint.

XV. That the bonds held by said plaintiffs are numbered as follows: 2751 to 2850, inclusive, and 2951 to 2990, inclusive.

XVI. That under the provisions of section 3 of the said act of August 15th, 1868, hereinbefore referred to, and under the provisions of the said act of December 13th, 1871, and of other acts on or about the second day of July, 1873, the said railroad company surrendered to the public treasurer of the said State of North Carolina one thousand seven hundred and three of the said high-numbered bonds, and also at or about the said time delivered to the said public treasurer two hundred and ninety-seven other valid coupon bonds of the said State of the denomination of one thousand dollars each, with interest coupons attached, and with coupons of interest already due, amounting to interest on said $297,000 from October 1st, 1868, to said second day of July, 1873, and received from the said public treasurer in lieu thereof all of the two million dollars of coupon mortgage bonds of the said company which had been theretofore deposited as aforesaid with the said public treasurer, and that the valid bonds thus returned were as follows:

268 bonds issued for the Western North Carolina Railroad Company, authorized by chapter 228, Laws of 1854 and 1855, and dated as follows:

3 bonds dated July 1st, 1866.

3 bonds dated October 1st, 1866.

103 bonds dated July 1st, 1867.

118 bonds dated January 1st, 1868.

41 bonds dated October 1st, 1868.

10 bonds issued under the funding act of August 20th, 1868, dated October 1st, 1868.

18 bonds issued on account of the Wilmington, Charlotte and Rutherford railroad, dated January 1st, 1866.

1 bond issued to same company, dated January 1st, 1867.

XVII. That the said State thus received back all of the said high-numbered State bonds except $297,000 thereof, and that the said 297 valid coupon bonds of the State are the consideration of the said 297 high-numbered bonds alleged to be invalid, and that by said deposit the State was put in funds to take up and became bound to take up the said 297 high-numbered bonds left outstanding or in some manner provide for their payment.

XVIII. That the said 297 valid coupon bonds of the State thus deposited are a trust for the benefit of the holders of the said 297 high-numbered bonds and are not and never have been the prop-

erty of the said State, and that the said State is in no way
11 entitled to the use and benefit thereof, but said State holds them only as a trust for those who advanced the consideration upon the faith of the validity of the said high-numbered bonds, and that it received the said valid bonds and held them subject to the trust as aforesaid, and that they are in fact the property of said plaintiffs and of other holders of outstanding high-numbered bonds, and that said State has no right, title, or claim thereto.

XIX. That the said State has obtained and holds the said valid State bonds deposited with it in the aforesaid exchanges and substitution without parting with any value whatever other than the original issue of high-numbered bonds claimed to be invalid as aforesaid, and that the State has at all times declined to acknowledge the validity of the said high-numbered State bonds and still continues to so decline, and that the said deposit is in law and equity a deposit of the said valid State bonds in trust for the benefit of the plaintiffs and the other holders of the said high-numbered State bonds, and that the said State is accountable to said plaintiffs for their *pro rata* share of the valid bonds thus as aforesaid deposited.

XX. That the plaintiffs, before the commencement of this action, duly demanded of the said State of North Carolina payment of the said one hundred and forty high-numbered bonds held by said plaintiffs, and have also duly demanded of the said State the payment of all past-due coupons attached to the said bonds, but such payments have been refused by the said State, and said plain-
12 tiffs, by their attorney, Spier Whitaker, prior to the beginning of this action, to wit, on the 22nd day of March, 1888, at the office of the public treasurer of the State of North Carolina, demanded of the said State, through its public treasurer, that it deliver to these plaintiffs one hundred and forty of the said valid State bonds which were so delivered to the said State, and also requested the said State to acknowledge that it held one hundred and forty of the said valid State bonds as trustee for and for the use and benefit of these plaintiffs and to account to them for the same, all of which requests were refused.

XXI. That the overdue coupons upon the said one hundred and forty high-numbered State bonds amount to the sum of one hundred and fifty-nine thousand six hundred dollars, and the average due date thereof is the first day of July, 1878, and that the overdue coupons upon the said 140 valid State bonds to which said plaintiffs are entitled is also the sum of one hundred and fifty-nine thousand six hundred dollars, and the average due date thereof is the 1st day of July, 1878, or some date anterior thereto.

And your petitioners further show that the following are copies of the exhibits annexed to the complaint and hereinbefore referred to:

EXHIBIT "A."

This agreement made this eleventh day of September one thousand eight hundred and sixty-eight, by and between Mes-
13 sieurs Schepeler & Company and Messrs. Baltzer & Taaks of

the city of New York, parties of the first part, and John F Pickrell also of the city of New York, party of the second part, witnesseth:

I.

The parties of the first part agree to sell and deliver to the party of the second part, and the party of the second part agrees to purchase and take of the parties of the first part, ten thousand tons of English or Welsh iron rails, of well-known, good brands (twenty-two hundred and forty pounds to the ton, English or American weight) of the pattern known as Erie T to be slotted or notched for the ordinary American lip chain, and to be of the usual weights and lengths of what are known in the market as from fifty to fifty-two pounds per yard, at the price of seventy-nine dollars and thirty-six cents, legal tender United States currency; this price being based upon the present United States duty of fifteen dollars sixty-eight cents gold, if such duty shall be increased the party of the second part is to be charged with such increase, if actually paid by the parties of the first part, if diminished he is to be credited with the amount of the diminution, if the benefit of such diminution be actually obtained by the parties of the first part, such charge or allowance is to be made in currency at the rate of one hundred and forty-six for gold.

II.

14 The iron is to be laden on board ship at the place of shipment for transportation to the port of New York or at seller's option delivered at said port of New York within ten months from the date of this agreement. One thousand tons of said iron are to be laden on shipboard at the place of shipment for transportation to New York, or at seller's option delivered in New York within six weeks from the date of this contract. The remainder of said iron is to be laden on board ship at the place of shipment for transportation to New York or at seller's option delivered in New York at the rate of about three thousand tons in each three months.

Whenever any of such iron is delivered in New York the same at seller's option may be delivered from warehouse or from on board ship in the port of New York, if delivered from warehouse to be delivered at the water's edge.

It is expressly understood that the parties of the first part do not undertake to deliver all the iron within ten months from the date hereof, but do undertake to have all the iron not delivered from warehouse as aforesaid placed on board ship at the place of shipment ready for transportation to the port of New York within the time aforesaid.

III.

The iron is to be paid for as follows: The party of the second part is to deposit with the Continental National bank on or before the execution of this agreement such an amount of the bonds of the

State of North Carolina as will at the market price on the
15 day of deposit be equal to the whole purchase-money for the said ten thousand tons of iron, and fifteen per cent. in addition thereto, which margin of fifteen per cent. is to be kept good until the full performance of this contract. The said bonds are to be held by said bank subject to the joint order of the parties of the first and second part and William J. Hawkins or his attorney, or the survivors of said parties respectively, on the presentation of a warehouse receipt or ship's delivery order for any lot of said iron the party of the second part and said William J. Hawkins or the survivor of them are to join with the parties of the first part in drawing an order on said bank in favor of the parties of the first part for so many of the said bonds as will at the market price thereof on the day of drawing equal the sum payable for such lot of iron at the price of seventy-nine dollars and thirty-six cents per ton as aforesaid, or pay that amount in money.

Upon the presentation of a bill of lading for any lot of such iron placed on shipboard for transportation to the port of New York or Norfolk, Virginia, the party of the second part and said Hawkins or the survivor of them shall join with the parties of the first part in drawing an order on the said bank in favor of the said parties of the first part for so many of said bonds as will at the market price thereof on the day of drawing equal the sum due for the iron mentioned in the bill of lading at forty-nine dollars and forty-six cents per ton, the balance payable for such iron, namely, twenty-nine dollars and ninety cents per ton shall be paid in like manner on
16 the arrival of the vessel containing the same at the port of New York or the port of Norfolk. Notice shall be given to the party of the second part or his personal representatives of the arrival of any ship containing iron and he or they are to be ready to receive the same whenever the ship is ready to discharge.

In the event of the death of the said party of the second part and no appointment of a personal representative at the time notice is required to be given, such notice may be given to the said William J. Hawkins by letter addressed to him at the city of New York. If at any time the party of the second part or his personal representative or the said William J. Hawkins or his attorney or the survivor of them shall refuse to join in drawing an order for the amount due for iron as aforesaid, the parties of the first part may retain the warehouse receipt or bill of lading or ship's delivery order, and may sell the iron for which payment has been refused, at any time after five days' notice of intention to sell, either at public or private sale for and on account of the party of the second part or his personal representatives who shall be liable to reimburse the parties of the first part any loss on such resale, such notice of intention to sell to be given by depositing the same in the general post office in the city of New York addressed to the party of the second part or his personal representative or the said William J. Hawkins in the event of the death of the said party of the second part and the non-appointment of any personal representative at the said city of New York.

17

IV.

If any cargo of the said iron shall be lost at sea, or while in port, or for any cause whatsoever beyond the control of the said parties of the — part, shall fail to arrive, the parties of the first part shall not be held in any manner liable, or be bound to replace the same. In case of the loss of any iron in transit, the parties of the first part agree to refund to the party of the second part the amount paid on the same, as soon as the insurance thereon shall be legally due from the underwriters who shall have insured the same.

V.

The warehouse receipts or ship's delivery order and bills of lading hereinbefore mentioned are to be presented to the party of the second part or his personal representative, or the said William J. Hawkins at the present office of the said party of the second part in the city of New York, unless he shall hereafter designate some other place in the city of New York for that purpose.

VI.

It is understood that the said bonds are deposited as a fund out of which to pay for the said iron, and that the parties of the first part are to have a lien on the same, for the faithful performance of this contract, on the part of the party of the second part, but it is understood that the parties of the first part do not look solely to the said bonds for payment, and if for any reason they should at
18 any time fail to constitute a sufficient fund for payment, the parties of the first part are nevertheless to be paid for iron at the same rates and times as hereinbefore provided.

VII.

The party of the second part reserves the right to sell any or all of the bonds deposited with said bank, and in case of sale the money realized for the same, or a sufficient amount to cover the price of all said iron, and 15 per cent. in addition thereto, shall be placed with said bank on the same terms and represents the said bonds for all the purposes of this contract.

The said bank shall deliver the bonds sold on the presentation and delivery of such joint order as aforesaid. The parties of the first part shall have their election to draw, in payment for iron, bonds, or money, the proceeds of bonds, if any shall have been substituted in the place of bonds sold.

VIII.

On receiving timely notice from the said party of the second part, the parties of the first part agree if it shall occasion no delay, or not interfere with any pending arrangement or negotiation, to endeavor to place such portion of the iron as they may be requested on board ship for transportation to the port of Norfolk, Virginia; and for all

iron shipped to Norfolk instead of New York the party of the second part agrees to pay, in addition to the prices before mentioned,
19 the difference between the cost of freight to Norfolk and what would have been the cost of freight if shipped to New York.

IX.

In the event of breach of this agreement by either of the parties to the same the measure of damages recoverable by the parties of the first part shall be the profits which they can, with reasonable certainty, show that they otherwise would have made, and in addition thereto, any loss sustained on any resale of iron. And the measure of damages recoverable by the party of the second part shall be the difference between the costs of replacing the iron which the parties of the first part may fail to deliver and the price at which they were to deliver.

In testimony whereof the said parties to these presents have hereunto subscribed their names, the day and year first above written.

(Signed) SCHEPELER & CO.,
By JOHN T. SCHEPELER.

(Signed) BALTZER & TAAKS,
By H. R. BALTZER.

(Signed) JOHN F. PICKRELL.

In presence of—
(Signed) GEORGE H. STURR.

STATE OF NEW YORK, }
City and County of New York. }

Be it known that on this twenty-fourth day of September, in the year one thousand eight hundred and sixty-eight, before me
20 personally appeared John F. Schepeler, Herman R. Baltzer, and John F. Pickrell, known to me to be the individuals described in and who executed the foregoing instrument, and they severally acknowledge to me that they executed the same, and the said John F. Schepeler further acknowledged that he executed the same in the name of and as the act and deed of the firm of Schepeler & Co., of which he is a member, and the said Herman R. Baltzer acknowledged that he executed the same in the name of and as the act and deed of the firm of Baltzer & Taaks, of which he is a member.

[SEAL.] In witness whereof I have set my hand and affixed my official seal the day and year last above written.

(Signed) GEORGE H. STURR,
Notary Public, New York County.

21 EXHIBIT "B."

Whereas Messrs. Schepeler & Co., Messrs. Baltzer & Taaks, and John F. Pickrell have entered into an agreement, of even date here-

with, by which the said Schepeler & Co. and Baltzer & Taaks agree to sell and deliver on certain terms therein mentioned ten thousand tons of iron rails to the said John F. Pickrell, a copy of which said agreement is annexed hereto, and which said agreement provided for the payment for said iron by said Pickrell by the appropriation of certain bonds of the State of North Carolina in the manner set forth in said agreement: Now, therefore, in consideration of the premises set forth in the said agreement and of the undertaking of the parties of the first part therein mentioned as therein expressed and as hereinafter expressed, I, William J. Hawkins, hereby agree that fourteen hundred bonds of the State of North Carolina, each for $1,000, numbered from 1600 to 3000, inclusive, which are now on deposit in the Continental National Bank of the City of New York, subject to my order as president of the Chatham Railroad Company of North Carolina, shall remain on deposit in said bank, subject to the joint order of the parties mentioned in said contract as being provided while said contract is being performed, for the purpose of providing for the payment of said iron and as security for the performance of said contract as therein provided, and I agree to unite in drawing the orders therein provided for at the times and in the manner therein set forth; provided, however, that it is hereby distinctly understood and agreed that whenever any delivery
22 of said bonds is to be made and any order for such delivery is required pursuant to said contract, I am to have the option and right to pay in money the sum payable under said contract for the iron in respect to which such delivery of bonds is required at the contract price—that is to say, at the rate of forty-nine dollars and forty-six cents per ton on the presentation of the bill of lading and twenty-nine dollars and ninety cents per ton on the delivery of the iron, and upon such money payments being made by me I shall have the right to withdraw from deposit the bonds which otherwise would have been delivered under said contract, and such bonds shall be delivered to me by said Continental National bank on the presentation of such joint order as aforesaid, such option and right to be exercised by me within five days after being notified in the manner provided in the contract of the right of the said parties therein named to a delivery of bonds pursuant thereto.

It is also hereby expressly provided that in case of loss of the iron or any part thereof on shipboard between the port of shipment and the port of entry or delivery all payments made on account thereof are to be refunded by said Schepeler & Co. and Baltzer & Taaks as soon as such loss is ascertained.

N. Y., Sept. 11, A. D. 1868.

W. J. HAWKINS,
President Chatham Railroad Co.

Witness:
JOHN D. WHITFORD.

23 And your petitioners further show that in said complaint they prayed for judgment as follows:

1. That the said one hundred and forty State bonds numbered

from 2751 to 2850, inclusive, and from 2951 to 2990, inclusive, be adjudged valid bonds as between the said defendant and said plaintiffs, and that the said defendant be adjudged to pay to the plaintiffs the said sum of one hundred and fifty-nine thousand six hundred dollars, being the overdue coupons of the said bonds, together with interest thereon from said first day of July, 1878.

2. Or that the said defendant be adjudged to have held and to hold 140 of the said valid State bonds so deposited with it as aforesaid in trust for these plaintiffs and that said defendant account to them for the same, and that the said bonds be delivered to these plaintiffs by the said defendant, and that these plaintiffs recover of the said defendant the sum of one hundred and fifty-nine thousand six hundred dollars, being the accrued interest on the said valid bonds, together with interest on the said sum from the said first day of July, 1878.

3. Or that these plaintiffs recover of the said defendant the sum of $140,000, together with interest thereon from the first day of October, one thousand eight hundred and sixty-eight.

24 4. Or that these plaintiffs have such other or further judgment or relief in the premises as shall to the court seem meet.

5. And for the costs of this action to be taxed by the clerk.

Your petitioners further show that the said State of North Carolina interposed an answer to said complaint, and upon the action coming on for trial made a preliminary motion to dismiss your petitioners' said complaint on the ground that the sixth section of the first article of the constitution of the State of North Carolina, as amended by amendment adopted in the year 1880, prohibited the payment, by the legislature of the State of North Carolina, of your petitioners' claim, as set forth in said complaint, and that the court could not decree or recommend that it should be paid by the said legislature; that said section of the constitution as so amended is as follows:

"The State shall never assume or pay or authorize the collection of any debt or obligation, express or implied, incurred in aid of insurrection or rebellion against the United States or any claim for the loss or emancipation of any slave, nor shall the General Assembly assume or pay or authorize the collection of any tax to pay, either directly or indirectly, expressed or implied, any debt or bond incurred or issued by authority of the convention of the year one thousand eight hundred and sixty-eight, nor any debt or

25 bond incurred or issued by the legislature of the year one thousand eight hundred and sixty-eight, either at its special session of the year one thousand eight hundred and sixty-eight or at its regular sessions of the years one thousand eight hundred and sixty-eight and one thousand eight hundred and sixty-nine, and one thousand eight hundred and sixty-nine and one thousand eight hundred and seventy, except the bonds issued to fund the interest on the old debts of the State, unless the proposing to pay the same shall have first been submitted to the people and by them ratified

by the vote of a majority of all the qualified voters of the State at a regular election held for that purpose."

Your petitioners further show that thereupon on said motion to dismiss, your petitioners in answer thereto drew in question the validity of said sixth section of article first of the constitution of the State of North Carolina as so amended, on the ground that the said section as so amended was repugnant to the Constitution of the United States, and was therefore unconstitutional and utterly void, null, and of no effect.

That said motion was duly argued before the supreme court of the State of North Carolina by the counsel for the State and for your petitioners, and thereafter and in the September term, 1889, a judgment was rendered by said court granting and allowing said motion on behalf of the State and dismissing your petitioners said complaint with costs, which said judgment is final.

26 Your petitioners further show that the principal question involved in the argument, decision, and judgment in the supreme court of the State of North Carolina, was the constitutionality of said sixth section of article first of the constitution of the State of North Carolina as so amended by amendment adopted in the year 1880, and whether said section as so amended was repugnant to the Constitution of the United States, and that it appears from the record of the action in said supreme court that it was decided and adjudged by said supreme court that it was not so repugnant or unconstitutional, and that said decision was in favor of its validity, and your petitioners desire to have the said decision and judgment of said supreme court reviewed by the Supreme Court of the United States, and for that purpose desire to obtain the usual writ and citation to perfect an appeal to said Supreme Court of the United States.

Your petitioners further show that the said supreme court of the State of North Carolina is the highest court of law or equity in the said State of North Carolina in which a decision or judgment in this suit could be had, and that in said decision was drawn in question the validity of a certain statute of the State of North Carolina on the ground of its being repugnant to the Constitution of the United States, and that said decision was in favor of the validity of said statute; and your petitioners further show that they desire to have the ruling of said Supreme Court of the United States upon the questions involved in this case.

27 Wherefore your petitioners pray that your honor will grant and sign the usual citation and allow the usual writ of error according to the statute in such case made and provided.

Dated New York, November 21st, 1890.

HERMANN R. BALTZER,
WILLIAM G. TAAKS,
By H. R. BALTZER, *Att'y.*

JAMES S. STEARNS,
Attorney for Plaintiffs in Error, 58 William street, New York.

28 STATE OF NEW YORK,
Southern District of New York, } *ss:*
City and County of New York,

Hermann R. Baltzer, of the town of Richmond, Richmond county and State of New York, one of the petitioners above named, being duly sworn, says that the foregoing petition is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true.

HERMANN R. BALTZER.

Sworn to before me this 21st day of November, 1890.

[Seal William H. Thitchener, Notary Public, New York.]

W. H. THITCHENER,
Notary Public (69), *N. Y. Co.*

29 [Endorsed:] U. S. Supreme Court. Hermann R. Baltzer and William G. Taaks, plaintiffs in error, against The State of North Carolina, defendant in error. Petition for citation and writ of error. James S. Stearns, attorney for plaintiff in error, 58 William street, New York.

30 Supreme Court of the United States.

HERMANN R. BALTZER and WILLIAM G. TAAKS, Plaintiffs in Error,
against
THE STATE OF NORTH CAROLINA, Defendant in Error.

Of October term, in the year of our Lord one thousand eight hundred and ninety-one.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the capitol, in the city of Washington, come the said Hermann R. Baltzer and William G. Taaks, by James S. Stearns, their attorney, and say that in the record and proceedings aforesaid, there is manifest error in this, to wit:

1. That the supreme court of the State of North Carolina allowed the defendant's motion to dismiss the complaint herein for lack of jurisdiction, and held and decided that the portion of section six of article one of the constitution of the State of North Carolina added thereto by amendment adopted in the year 1880 was valid and constitutional, said paragraph of said section added by said
31 amendment being as follows:

"Nor shall the General Assembly assume or pay or authorize the collection of any tax to pay either directly or indirectly, expressed or implied, any debt or bond incurred or issued by authority of the convention of the year 1868, nor any debt or bond incurred or issued by the legislature of the year 1868 either at its special session of the year 1868 or at its regular sessions of the years

1868 and 1869 and 1869 and 1870, except the bonds issued to fund the interest on the old debts of the State, unless the proposing to pay the same shall have first been submitted to the people and by them ratified by the vote of a majority of all the qualified voters of the State at a regular election held for that purpose."

2. That the supreme court of the State of North Carolina, although the plaintiffs drew in question the validity of the said portion of said section on the ground that it was repugnant to the Constitution of the United States and was, therefore, unconstitutional and void, overruled the contention of the said plaintiffs and decided and adjudged that said portion of said section was not repugnant to the Constitution of the United States and was not unconstitutional and void, and that the decision of said court was in favor of the validity of said amendment.

3. That the supreme court of North Carolina thereupon
32 allowed the motion of defendant to dismiss the complaint herein upon the ground that the said section of the constitution of the State of North Carolina as amended was valid and constitutional and adjudged and decreed that the complaint herein be dismissed.

4. That the said court declined to allow a trial of the merits of plaintiffs' action, and upon allowing said preliminary motion to dismiss the complaint herein entered a judgment of dismissal as aforesaid.

5. That the said court failed to sustain the plaintiffs' contention that said portion of said amendment was wholly unconstitutional, void, and of no effect, and declined to assume jurisdiction of the case or to try the same, and thereby deprived plaintiffs of their right to a trial of their claim as secured to them by the constitution of the State of North Carolina.

6. That the court based its decision in part upon the following grounds, set forth in its opinion as follows:

"While the State, through its constituted authorities, soon after their issue, regarded and treated the bonds issued to the Chatham Railroad Company as invalid, it was apprehended, not unreasonably, that they might be purchased innocently in some instances in the course of business at some price, and in other instances by
33 mere speculators in the markets, who would insist upon their validity and payment, and that the State would be greatly annoyed and harassed in a variety of ways, putting it to great trouble and expense to defend itself against such unfounded claims. In view of this state of things, the valid bonds were so received, not for the purpose of paying directly or indirectly the invalid ones, but to indemnify the State against costs and expenditures incurred in resisting them," although this case was not before the court on its merits and no evidence had been introduced and the above facts did not appear on the face of the complaint, and although on this preliminary motion to dismiss the facts stated in the complaint should have been taken for true.

7. That the court of North Carolina decided that the claim of this

plaintiff was a "debt or bond" within the purview of the aforesaid section of the State constitution as amended.

8. That, the State of North Carolina having received from the Chatham Railroad Company $397,000 of confessedly valid bonds for the purpose of providing the means of paying $397,000 of bonds which the State had repudiated since their issue, the court did not decide that the State had no right to appropriate the confessedly valid bonds to their own use and still decline to pay or recognize the repudiated bonds.

9. That, notwithstanding the plaintiff, the owner of certain
34 of the said repudiated bonds, claimed in this suit to be entitled to recover the proportionate amount of the said confessedly valid bonds as his property, held in trust for him by the State, the said court did not hold that he could recover.

10. That although the said State had issued the confess-ly valid bonds and received value therefor and had received them back as a substitute for and as a fund for payment of the said repudiated bonds, the said court did not decide that the State was under an obligation to pay or account for either the confessedly valid bonds or the repudiated bonds.

11. That although the State received the valid bonds as an indemnity or trust fund to pay the plaintiffs' bonds and others, and although the railroad company had relinquished all claim thereupon and devoted the same to such payment, the court decided that the State was entitled to hold the said valid bonds for its own use and benefit, free of all obligation, whether in law or equity, to apply the bonds to the extinguishment of plaintiffs' claim and other similar claims.

And the said Hermann R. Baltzer and William G. Taaks pray that the judgment aforesaid may be reversed, annulled, and held for naught, and that they be restored to all things which they have lost by occasion of the said judgment.

JAMES S. STEARNS,
Attorney for Plaintiffs in Error.

35 [Endorsed:] U. S. Supreme Court. Hermann R. Baltzer and William G. Taaks, plaintiffs in error, against The State of North Carolina, defendant in error. Assignment of errors. James S. Stearns, attorney for plaintiffs in error, 58 William street, New York.

36 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the supreme court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of North Carolina, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit between Hermann R. Baltzer and William G. Taaks against the State of North Carolina, wherein was drawn in question the validity

of a statute of or an authority exercised under the said State of North Carolina on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of their validity, a manifest error hath happened, to the great damage of the said Hermann R. Baltzer and William G. Taaks, as is said and appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of
37 the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at said place, before the justices aforesaid, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this first day of September, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and sixteenth.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States of America.

The foregoing writ is hereby allowed.
September 1st, 1891.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

38 [Endorsed:] U. S. Supreme Court. Hermann R. Baltzer and William G. Taaks, plaintiffs in error, against The State of North Carolina, defendant in error. Writ of error. James S. Stearns, attorney for plaintiffs in error, 58 William street, New York.

39 Supreme Court of the United States of America.

HERMANN R. BALTZER and WILLIAM G. TAAKS, Plaintiffs in Error, *against* THE STATE OF NORTH CAROLINA, Defendant in Error.	Bond for Damages and Costs.

Know all men by these presents that we, Hermann R. Baltzer, of Richmond, in the county of Richmond and State of New York; William G. Taaks, of Stuttgart, in the Empire of Germany, and Campbell C. Brown, of No. 430 Clinton street, in the city of Brook-

lyn, county of Kings, and State of New York, and Paul Lichtenstein, of 111 Joralemon street, in the city of Brooklyn aforesaid, are held and firmly bound unto the above-named The State of North Carolina in the sum of one thousand dollars, to be paid to the said The State of North Carolina; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the twenty-first day of November, in the year of our Lord one thousand eight hundred and ninety.

Whereas the above-named Hermann R. Baltzer and William G. Taaks have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment or decree rendered in the above-entitled suit by the supreme court of the State of North Carolina:

40 Now, therefore, the condition of this obligation is such that if the above-named Hermann R. Baltzer and William G. Taaks shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HERMANN R. BALTZER. [SEAL.]
WILLIAM G. TAAKS,
By H. R. BALTZER, *Att'y.* [SEAL.]
CAMPBELL C. BROWN. [SEAL.]
PAUL LICHTENSTEIN. [SEAL.]

Sealed and delivered and taken and acknowledged this 21st day of November, 1890, before me—

W. H. THITCHENER,
[SEAL.] *Notary Public* (69), *N. Y. Co.*

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

Campbell C. Brown, of the city of Brooklyn, Kings county, State of New York, being duly sworn, doth depose and say that he is a resident of and a freeholder within the State of New York, and that he is worth the sum of two thousand dollars over and above all his just debts and liabilities.

CAMPBELL C. BROWN.

Sworn to this 21st day of November, A. D. 1890, before me—

W. H. THITCHENER,
[SEAL.] *Notary Public* (69), *N. Y. Co.*

41 UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

Paul Lichtenstein, of the city of Brooklyn, Kings county, and State of New York, being duly sworn, doth depose and say that he is a resident of and freeholder within the State of New York, and

that he is worth the sum of two thousand dollars over and above all his just debts and liabilities.

PAUL LICHTENSTEIN.

Sworn to this 21st day of November, A. D. 1890, before me—
W. H. THITCHENER,
[SEAL.] *Notary Public* (69), *N. Y. Co.*

42 [Endorsed:] U. S. Supreme Court. Hermann R. Baltzer and William G. Taaks, plaintiffs in error, against The State of North Carolina, defendant in error. Copy. Bond for costs on appeal. James S. Stearns, attorney for plaintiffs in error, 58 William street, New York. The within bond is approved as to its amount, form, and manner of execution, and as to the sufficiency of the sureties. Dated September 1st, 1891. Sam'l Blatchford, associate justice of the Supreme Court of the United States.

43 UNITED STATES OF AMERICA, *ss:*

To the State of North Carolina, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of North Carolina, wherein Hermann R. Baltzer and William G. Taaks are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Dated September 1st, 1891.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

Service accepted as of this date, Sept. 12, 1891.
THEO. F. DAVIDSON,
Atto. Gen'l N. C.

Service accepted as of this date, Sept. 12th, 1891.
C. M. BUSBEE,
Atto. & Sol. for the State of North Carolina.

44 [Endorsed:] U. S. Supreme Court. Hermann R. Baltzer and William G. Taaks, plaintiffs in error, against The State of North Carolina, defendant in error. Citation. James Stearns, attorney for plaintiffs in error, 58 William street, New York.

STATE OF NORTH CAROLINA, } *ss:*
County of Wake, }

Robert H. Brooks, of the city of Raleigh, in the county of Wake, and State of North Carolina, being duly sworn, says that he is twenty-one years of age and upwards; that on the 7th day of September,

1891, at Raleigh, in the county — Wake, and State of North Carolina, he served the within citation on Thomas M. Holt, governor of the State of North Carolina, by delivering a copy thereof to said Thomas M. Holt personally and leaving the same with him, and at the same time and place showing to him the within original citation.

R. H. BROOKS, *D. S.*,
For M. W. PAGE, *Sheriff.*

Sworn to before me this 7th day of September, 1891.

[Seal Weldon T. Smith, Notary Public, Wake Co., N. C.]

W. T. SMITH,
Notary Public.

45 Supreme Court, State of North Carolina.

HERMAN R. BALTZER and WILLIAM G. TAAKS
against
THE STATE OF NORTH CAROLINA.

Complaint.

The plaintiffs, Herman R. Baltzer and William G. Taaks, partners, doing business under the firm name of Baltzer & Taaks, complaining of the defendant, allege:

I. That at the times hereinafter named these plaintiffs were partners, doing business as bankers and brokers and negotiators of securities in the city, county, and State of New York.

II. That at the times hereinafter named "The Chatham Railroad Company" was a corporation organized under the laws of and doing business in the said State of North Carolina, and was recognized at all times by the said State as such a corporation; that by an act of the General Assembly of said State entitled "An act concerning the Chatham railroad, amendatory of certain acts, and authorizing a change of name," ratified the thirteenth day of December, 1871, the name of the said "The Chatham Railroad Company" was changed to "The Raleigh & Augusta Air Line Railroad Company," but that the identity of the said corporation was in no way changed and its powers and liabilities in no way altered by the said act.

46 III. That at the special session of the General Assembly of said State held in the months of July and August, 1868, an act was passed entitled "An act to amend the charter of the Chatham Railroad Company," ratified the 15th day of August, 1868, which act is hereby referred to and made a part of this complaint the same as if herein at length recited, wherein it was, among other things, provided that the public treasurer of the said State should deliver to the said railroad company coupon bonds of the State of North Carolina of one thousand dollars ($1,000) each, to an amount not exceeding two million dollars ($2,000,000), the bonds bearing

6 per cent. interest, payable semi-annually, the principal payable at the end of thirty years from the date thereof, and further providing that before the said public treasurer should deliver any of the said two million dollars of State bonds to the said company the president of the said Chatham Railroad Company should deposit with him coupon bonds of the said company for a like amount, bearing the same interest as the said State bonds and same date, the principal and coupons payable at the same times and places, and that to secure the payment of the principal and interest of the said bonds of the said railroad company the said State should have a lien more effectually secured by a first mortgage upon certain property of the said railroad company therein mentioned, duly executed and registered, with power given to the board of internal improvement of the said State to enter upon and sell the said property in case of default so as to protect the State, and said act further provided that the said Chatham Railroad Company might at any time before maturity discharge its said bonds deposited with
47 the said public treasurer by substituting in lieu thereof coupon bonds or other indebtedness of the said State, or payment in national currency.

IV. 1. That pursuant to the said act of August 15th, 1868, and on or about the 21st day of September, 1868, the said railroad company, by its proper officers, did execute and deliver under its corporate seal to the said public treasurer first-mortgage bonds of said company, dated October 1st, 1868, in amount two million dollars ($2,000,000), and also a first mortgage as security for the same, executed in the form and according to the terms of the said act, which said mortgage was thereafter duly registered, the record whereof is hereby referred to and made a part of this complaint the same as if herein at length recited, and was a first lien upon the property covered by it and mentioned in the said act, and that said bonds were held on deposit by the public treasurer of the said State for the purposes named in the said act, and were subsequently returned according to its provisions, as hereinafter stated.

2. That on or subsequently to the nineteenth day of October, 1868, said two thousand coupon bonds of the said State, numbered 1201–3200, inclusive, bearing date October 1st, 1868, each for one thousand dollars, were executed by the officials of the said State in the manner and form prescribed in and in accordance with the said act, and were thereupon delivered to the proper officers of the said railroad company, and that the said last-mentioned bonds are commonly known as "high-numbered" Chatham bonds to distinguish them from another issue of State bonds also called Chatham bonds.

48 3. That the form of each of said bonds, the number alone necessarily varying, is as follows:

UNITED STATES OF AMERICA.

No. 2801.

It is hereby certified that the State of North Carolina justly owes to —— —— or bearer one thousand dollars, lawful money of the United States, at the National Bank of the Republic, in the city of New York, on the first day of October, 1898, with interest thereon at the rate of six per centum per annum, payable half yearly at the said bank on the first days of April and October in each year from the date of this bond and until the principal be paid on surrendering the proper coupons hereto annexed.

In witness whereof the governor of the said State, in virtue of power conferred by law, hath signed this bond and caused the great seal of the State to be hereto affixed, and her public treasurer hath countersigned the same at the seat of government of the said State this first day of October, 1868.

$1,000. W. W. HOLDEN, *Governor.*

Countersigned:
D. A. JENKINS,
Public Treasurer.

Issued under an act to amend the charter of the Chatham R. R. Co., ratified August 15th, 1868.

—— ——. [SEAL.]

4. That interest coupons were thereunto attached and were, save for dates and numbers necessarily varying, of the following tenor:

49 The State of North Carolina will pay to bearer, at the National Bank of the Republic, in the city of New York, on the first day of April, 1869, thirty dollars on bond 2801 for $1,000.

$30. D. A. JENKINS,
Public Treasurer.

V. That on or about the first day of September, 1868, before the said "high-numbered bonds" had been issued, the then president of the said Chatham Railroad Company, Dr. William J. Hawkins, met one John D. Whitford in New York, and with him entered into negotiations to use State bonds in constructing the road of said company, and they applied to one John F. Pickrell, a broker in New York, to aid them; that a private contract for constructing the said road is alleged to have been entered into at this time by and between said Pickrell and the said company, but these plaintiffs aver upon information and belief that the said contract was merely nominal.

VI. And the plaintiffs further state that early in the month of September, 1868, for the purpose of obtaining ten thousand tons iron rails for the construction of the said road the said company, through the said individuals, applied to certain persons doing business under the firm name of Schepeler & Co. to purchase from them

the said iron, and, said Schepeler & Co. being unable to secure the said iron themselves, a certain contract was made by and between the said Pickrell, Schepeler & Co., and these plaintiffs, of which a copy is hereto annexed, marked "Exhibit A," and a certain other contract was made by the said W. J. Hawkins, president of
50 the said railroad company, of which a copy is hereto annexed, marked "Exhibit B," which contracts are hereby referred to and made a part of this complaint the same as if herein at length recited, and the said plaintiffs state upon information and belief that the said contract "A," though nominally made with the said Pickrell, was in reality made with the said railroad company.

VII. That, as provided in the said contracts and on or about November 2nd, 1868, three deliveries of iron were made by these plaintiffs, amounting to 2,104 tons of iron, for which these plaintiffs and their said associates became entitled to receive the sum of $167,097.73 in money, and that the said iron all went to the said railroad company and was used by it in the construction of its said road, and that under the third and sixth sections of said contract marked "Exhibit A" and under the provisions of the said contract marked "Exhibit B" these plaintiffs and said Pickrell and Whitford, as attorney for Hawkins, joined in an order on the Continental National Bank of the City of New York (where bonds of the said State of North Carolina had been deposited according to the said contracts) for certain bonds to provide for the payment of the said debt; that thereafter the sum of $73,483.10 was paid in cash on account of said debt, and that on or about November 20th, 1868, one hundred of the said State bonds called "high-numbered" bonds as aforesaid, and on or about November 21st, 1868, fifty more of such bonds, in all one hundred and fifty bonds, drawn from those so deposited as aforesaid, were delivered to these plaintiffs on account of said balance of $93,615.57, so due them as aforesaid.

51 VIII. That these plaintiffs before receiving the said 150 high-numbered bonds had negotiated a sale for them, but that before the said sale could be closed this issue of bonds was declared by the Stock Exchange of New York (where they had been listed as marketable bonds) to be unconstitutional and void and were stricken from the list of marketable bonds, and these plaintiffs state upon information and belief that the said State of North Carolina has refused and still does refuse to recognize the validity of said bonds.

IX. That it has never been possible to realize the said balance of $93,615.57 from said bonds at any time since they were delivered to these plaintiffs.

X. That immediately upon said decision and declaration by the New York Stock Exchange these plaintiffs notified said Pickrell, Hawkins, and Whitford that the said one hundred and fifty bonds were worthless and demanded payment of the said above sum in cash, but that these plaintiffs have not been able to obtain any settlement of this claim from the said persons or from anybody or any value for the iron thus delivered except the said discredited bonds of the State of North Carolina.

XI. That the only reduction of this sum of $93,615.57 due for said iron was made by the repurchase of ten of said 150 bonds by said Pickrell for $6,150, leaving a balance unpaid of $87,465.57.

XII. That there has been no further payment or reduction of the said balance nor has any interest been received thereon nor have the plaintiffs collected or been able to collect the said
52 sum of $87,465.57 or any part thereof from any source, and that the same is still unpaid except as aforesaid.

XIII. That, as these plaintiffs are informed and believe, out of the total of said issue of 2,000 high-numbered bonds issued under the said act of August 15th, 1868, only three hundred and two bonds were ever negotiated, for the reason that they and the act creating them were considered void and unconstitutional, and the rest of said discredited issue, to wit, 1,698 bonds, remained in the possession of the said railroad company and were returned to the said public treasurer, as hereinafter stated, without having been negotiated.

XIV. That, as these plaintiffs are informed and believe, all the bonds thus negotiated were negotiated at the full market value of valid securities of the same character and the said railroad company and the said State received each its full benefit accordingly, and that the same appears by the report of the Senate investigation committee, document 33, of the session of 1869–1870, which is hereby referred to and made a part of this complaint.

XV. That the bonds held by these plaintiffs are numbered as follows: 2751 to 2850, inclusive, and 2951 to 2990, inclusive.

XVI. That, as these plaintiffs are informed and believe, under the provisions of section 3 of the said act of August 15th, 1868, hereinbefore referred to, and under the provisions of the said act of December 13th, 1871, and of other acts, on or about the second day of July, 1873, the said railroad company surrendered to the
53 public treasurer of the State of North Carolina one thousand and seven hundred and three of the said high-numbered bonds, and also at or about the same time delivered to the said public treasurer two hundred and ninety-seven other valid coupon bonds of the said State of the denomination of one thousand dollars each, with interest coupons attached and with coupons of interest already due amounting to interest on said $297,000 from October 1st, 1868, to said second day of July, 1873, and received from the said public treasurer in lieu thereof all of the two million dollars of coupon mortgage bonds of the said company which had been theretofore deposited as aforesaid with the said public treasurer, and that the valid bonds thus returned were as follows:

268 bonds issued for the Western North Carolina Railroad Company, authorized by chapter 228 Laws of 1854 and 1855, and dated as follows:

3 bonds dated July 1st, 1866.
3 bonds dated October 1st, 1866.
103 bonds dated July 1st, 1867.
118 bonds dated January 1st, 1868.
41 bonds dated October 1st, 1868.

10 bonds issued under the funding act of August 20th, 1868, dated October 1st, 1868.

18 bonds issued on account of the Wilmington, Charlotte & Rutherford railroad, dated January 1st, 1866.

1 bond issued to same company, dated January 1st, 1867.

XVII. That the said State thus received back all of the said high-numbered State bonds except $297,000 thereof, and that the said 297 valid coupon bonds of the State are the consideration of
54 the said 297 high-numbered bonds alleged to be invalid, and that by said deposit the State was put in funds to take up and became bound to take up the said 297 high-numbered bonds left outstanding or in some manner provide for their payment.

XVIII. And these plaintiffs further state upon information and belief that the said 297 valid coupon bonds of the State thus deposited are a trust for the benefit of the holders of the said 297 high-numbered bonds and are not and never have been the property of the said State, and that the said State is in no way entitled to the use and benefit thereof, but said State holds them only as a trust for those who advanced the consideration upon the faith of the validity of the said high-numbered bonds, and that it received the said valid bonds and held them subject to the trust as aforesaid, and that they are in fact the property of these plaintiffs and of other holders of outstanding high-numbered bonds, and that said State has no right, title, or claim thereto.

XIX. And these plaintiffs further state upon information and belief that the said State has obtained and holds the said valid State bonds deposited with it in the aforesaid exchanges and substitution without parting with any value whatever other than the original issue of high-numbered bonds claimed to be invalid as aforesaid, and that the State has at all times declined to acknowledge the validity of the said high-numbered State bonds and still continues to so decline, and that the said deposit is in law and equity a deposit of the said valid State bonds in trust for the benefit of the plain-
55 tiffs and the other holders of the said high-numbered State bonds, and that the said State is accountable to these plaintiffs for their *pro rata* share of the valid bonds thus as aforesaid deposited.

XX. And the said plaintiffs further state that they have before the commencement of this action duly demanded of the said State of North Carolina payment of the said one hundred and forty high-numbered bonds held by these plaintiffs, and have also duly demanded of the said State the payment of all past-due coupons attached to the said bonds, but such payments have been refused by the said State, and these plaintiffs, by their attorney, Spier Whitaker, prior to the beginning of this action, to wit, on the 22nd day of March, 1888, at the office of the public treasurer of the State of North Carolina, demanded of the said State, through its public treasurer, that it deliver to these plaintiffs one hundred and forty of the said valid State bonds which were so delivered to the said State, and also requested the said State to acknowledge that it held one hundred and forty of the said valid State bonds as trustee for

and for the use and benefit of these plaintiffs and to account to them for the same, all of which requests were refused.

XXI. And the plaintiffs further state that the overdue coupons upon the said one hundred and forty high-numbered State bonds amount to the sum of one hundred and fifty-nine thousand six hundred dollars, and the average due date thereof is the first day of July, 1878, and that, as plaintiffs are informed and believe, the overdue coupons upon the said one hundred and forty valid
56 State bonds to which these plaintiffs are entitled is also the sum of one hundred and fifty-nine thousand six hundred dollars, and the average due date thereof is the first day of July, 1878, or some date anterior thereto.

1. The plaintiffs therefore demand judgment that the said one hundred and forty State bonds numbered from 2751 to 2850, inclusive, and from 2951 to 2990, inclusive, be adjudged valid bonds as between the said defendant and these plaintiffs, and that the said defendant be adjudged to pay to these plaintiffs the said sum of one hundred and fifty-nine thousand six hundred dollars, being the overdue coupons of the said bonds, together with interest thereon from said first day of July, 1878.

2. Or that the said defendant be adjudged to have held and to hold one hundred and forty of the said valid State bonds so deposited with it as aforesaid in trust for these plaintiffs, and that said defendant account to them for the same, and that the said bonds be delivered to these plaintiffs by the said defendant, and that these plaintiffs recover of the said defendant the sum of one hundred and fifty-nine thousand six hundred dollars, being the accrued interest on the said valid bonds, together with interest on the said sum from the said first day of July, 1878.

3. Or that these plaintiffs recover of the said defendant the sum of $140,000, together with interest thereon from the first day of October, one thousand eight hundred and sixty-eight.

4. Or that these plaintiffs have such other or further judgment or relief in the premises as shall to this court seem meet.

57 5. And for the costs of this action to be taxed by the clerk.

SPIER WHITAKER,
Attorney for Plaintiffs.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

Herman R. Baltzer, one of the plaintiffs above named, being duly sworn, says that the foregoing complaint is true of his own knowledge except as to those matters therein stated on information and belief, and that as to those matters he believes it to be true.

H. R. BALTZER.

Sworn to and subscribed before me this 24th day of March, 1888.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year aforesaid.

EDWIN F. COREY,
[SEAL.] *Commissioner for the State of North Carolina in New York, Office, 60 Wall Street, N. Y.*

His excellency Governor Alfred M. Scales—

Is respectfully requested to appear on behalf of the State of North Carolina and answer the complaint of the plaintiffs within twenty days after the service on him of the foregoing copy of their complaint.

SPIER WHITAKER,
Attorney for the Plaintiffs.

58 EXHIBIT "A."

This agreement, made this eleventh day of September, one thousand eight hundred and sixty-eight, by and between Messieurs Schepeler & Company and Messrs. Baltzer & Taaks, of the city of New York, parties of the first part, and John F. Pickrell, also of the city of New York, party of the second part, witnesseth:

I. The parties of the first part agree to sell and deliver to the party of the second part, and the party of the second part agrees to purchase and take of the parties of the first part, ten thousand tons of English or Welsh iron rails, of well-known, good brands (twenty-two hundred and forty pounds to the ton, English or American weight) of the pattern known as Erie T, to be slotted or notched for the ordinary American lip chain, and to be of the usual weights and lengths of what are known in the market as from fifty to fifty-two pounds per yard, at the price of seventy-nine dollars and thirty-six cents, legal tender United States currency; this price being based upon the present United States duty of fifteen dollars sixty-eight cents gold. If such duty shall be increased, the party of the second part is to be charged with such increase, if actually paid by the parties of the first part; if diminished, he is to be credited with the amount of the diminution, if the benefit of such diminution be actually obtained by the parties of the first part such charge or allowance is to be made in currency at the rate of one hundred and forty-six for gold.

II. The iron is to be laden on board ship at the place of
59 shipment for transportation to the port of New York, or at seller's option delivered at said port of New York, within ten months from the date of this agreement. One thousand tons of said iron are to be laden on shipboard at the place of shipment for transportation to New York, or at seller's option delivered in New York within six weeks from the date of this contract. The remainder of said iron is to be laden on board ship, at the place of shipment, for transportation to New York, or at seller's option delivered in New York at the rate of about three thousand tons in each three months.

Whenever any of such iron is delivered in New York, the same, at seller's option, may be delivered from warehouse or from on board ship in the port of New York, if delivered from warehouse, to be delivered at the water's edge.

It is expressly understood that the parties of the first part do not undertake to deliver all the iron within ten months from the date hereof, but do undertake to have all the iron not delivered from

warehouse, as aforesaid, placed on board ship at the place of shipment, ready for transportation to the port of New York within the time aforesaid.

III. The iron is to be paid for as follows: The party of the second part is to deposit with the Continental National bank, on or before the execution of this agreement, such an amount of the bonds of the State of North Carolina as will, at the market price on the day of deposit, be equal to the whole purchase-money for the said ten thousand tons of iron, and fifteen per cent. in addition thereto, which margin of fifteen per cent. is to be kept good until the
60 full performance of this contract. The said bonds are to be held by said bank subject to the joint order of the parties of the first and second part, and William J. Hawkins, or his attorney, or the survivors of said parties respectively, on the presentation of a warehouse receipt, or ship's delivery order, or for any lot of said iron, the party of the second part, and said William J. Hawkins, or the survivor of them, are to join with the party of the first part in drawing an order on said bank in favor of the party of the first part, for so many of the said bonds as will, at the market price thereof on the day of drawing, equal the sum payable for such lot of iron, at the price of seventy-nine dollars and thirty-six cents per ton, as aforesaid, or pay that amount in money.

Upon the presentation of a bill of lading for any lot of such iron placed on shipboard for transportation to the port of New York or Norfolk, Virginia, the party of the second part and said Hawkins, or the survivor of them, shall join with the parties of the first part in drawing an order on the said bank in favor of the said parties of the first part for so many of said bonds as will, at the market price thereof, on the day of drawing, equal the sum due for the iron mentioned in the bill of lading, at forty-nine dollars and forty-six cents per ton, the balance payable for such iron, namely, twenty-nine dollars and ninety cents per ton, shall be paid in like manner on the arrival of the vessel containing the same at the port of New York or the port of Norfolk. Notice shall be given to the party of the second part, or his personal representatives, of the arrival of any ship containing iron, and he or they are to be ready to receive the same whenever the ship is ready to discharge.

61 In the event of the death of the said party of the second part, and no appointment of a personal representative at the time notice is required to be given, such notice may be given to the said William J. Hawkins, by letter addressed to him at the city of Now York. If at any time the party of the second part, or his personal representatives, or the said William J. Hawkins, or his attorney, or the survivor of them, shall refuse to join in drawing an order for the amount due for iron, as aforesaid, the parties of the first part may retain the warehouse receipt, or bill of lading, or ship's delivery order, and may sell the iron for which payment has been refused, at any time after five day's notice of intention to sell, either at public or private sale, for and on account of the party of the second part, or his personal representatives, who shall be liable to reimburse the parties of the first part any loss on such resale,

such notice of intention to sell to be given by depositing the same in the general post office in the city of New York, addressed to the party of the second part, or his personal representative, or the said William J. Hawkins, in the event of the death of the said party of the second part, and the non-appointment of any personal representative at the said city of New York.

IV. If any cargo of the said iron shall be lost at sea, or while in port, or for any cause whatsoever beyond the control of the said parties of the first part, shall fail to arrive, the parties of the first part shall not be held in any manner liable, or be bound to replace the same. In case of the loss of any iron in transit, the parties of the first part agree to refund to the party of the second part the amount paid on the same, as soon as the insurance thereon
62 shall be legally due from the underwriters who shall have insured the same.

V. The warehouse receipts, or ship's delivery order and bills of lading hereinbefore mentioned, are to be presented to the party of the second part, or his personal representative, or the said William J. Hawkins, at the present office of the said party of the second part, in the city of New York, unless he shall hereafter designate some other place in the city of New York for that purpose.

VI. It is understood that the said bonds are deposited as a fund out of which to pay for the said iron, and that the parties of the first part are to have a lien on the same, for the faithful performance of this contract on the part of the party of the second part, but it is understood that the parties of the first part do not look solely to the said bonds for payment, and if for any reason they should at any time fail to constitute a sufficient fund for payment the parties of the first part are nevertheless to be paid for iron at the same rates and times as hereinbefore provided.

VII. The party of the second part reserves the right to sell any or all of the bonds deposited with said bank, and in case of sale the money realized for the same, or a sufficient amount to cover the price of all said iron and fifteen per cent. in addition thereto, shall be placed with said bank on the same terms, and represent the said bonds for all the purposes of this contract.

The said bank shall deliver the bonds sold on the presentation and delivery of such joint order, as aforesaid. The parties
63 of the first part shall have their election to draw, in payment for iron, bonds or money, the proceeds of bonds, if any shall have been substituted in the place of bonds sold.

VIII. On receiving timely notice from the said party of the second part, the parties of the first part agree, if it shall occasion no delay, or not interfere with any pending arrangement or negotiation, to endeavor to place such portion of the iron as they may be requested on board ship, for transportation to the port of Norfolk, Virginia; and for all iron shipped to Norfolk instead of New York, the party of the second part agrees to pay, in addition to the price before mentioned, the difference between the cost of freight to Norfolk and what would have been the cost of freight if shipped to New York.

IX. In the event of breach of this agreement by either of the parties to the same, the measure of damages recoverable by the parties of the first part shall be the profits which they can, with reasonable certainty, show that they otherwise would have made, and in addition thereto, any loss sustained on any resale of iron. And the measure of damages recoverable by the party of the second part shall be the difference between the costs of replacing the iron which the parties of the first part may fail to deliver and the price at which they were to deliver.

In testimony whereof, the said parties to these presents have hereunto subscribed their names, the day and year first above written.

(Signed) SCHEPELER & CO.,
By JOHN T. SCHEPELER.
(Signed) BALTZER & TAAKS,
By H. R. BALTZER.
(Signed) JOHN F. PICKRELL.

In presence of—
(Signed) GEORGE H. STURR.

64 STATE OF NEW YORK, }
City and County of New York. }

Be it known that on this, the twenty-fourth day of September, in the year one thousand eight hundred and sixty-eight, before me personally appeared John F. Schepeler, Hermaan R. Baltzer, and John F. Pickrell, known to me to be the individuals described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same; and the said John F. Schepeler further acknowledged that he executed the same in the name of and as the act and deed of the firm of Schepeler & Co., of which he is a member; and the said Hermaan R. Baltzer acknowledged that he executed the same in the name of and as the act and deed of the firm of Baltzer & Taaks, of which he is a member.

In witness whereof I have set my hand and affixed my official seal the day and year last above written.

(Signed) GEORGE H. STURR,
[SEAL.] *Notary Public, New York County.*

65 EXHIBIT "B."

Whereas Messrs. Schepeler & Co., Messrs. Baltzer & Taaks, and John F. Pickrell have entered into an agreement, of even date herewith, by which the said Schepeler & Co. and Baltzer & Taaks agree to sell and deliver, on certain terms therein mentioned, ten thousand tons of iron rails to the said John F. Pickrell, a copy of which said agreement is annexed hereto and which said agreement provides for the payment for said iron by said Pickrell by the appropriation of certain bonds of the State of North Carolina in the manner set forth in said agreement:

Now, therefore, in consideration of the premises set forth in the

said agreement and of the undertaking of the parties of the first part therein mentioned, as therein expressed and as hereinafter expressed, I, William J. Hawkins, hereby agree that fourteen hundred bonds of the State of North Carolina, each for $1,000, numbered from 1600 to 3000, inclusive, which are now on deposit in the Continental National bank, in the city of New York, subject to my order as president of the Chatham Railroad Company of North Carolina, shall remain on deposit in said bank, subject to the joint order of the parties mentioned in said contract as being provided while said contract is being performed for the purpose of providing for the payment of said iron and as security for the performance of said contract as therein provided; and I agree to unite in drawing the orders therein provided for at the times and in the manner therein set forth; provided, however, that it is hereby distinctly understood and agreed that whenever any delivery of said bonds is to be made and any order for such delivery is required pursuant
66 to said contract I am to have the option and right to pay in money the sum payable under said contract for the iron in respect to which such delivery of bonds is required at the contract price—that is to say, at the rate of forty-nine dollars and forty-six cents per ton on the presentation of the bill of lading and twenty-nine dollars and ninety cents per ton on the delivery of the iron—and upon such money payments being made by me I shall have the right to withdraw from deposit the bonds which otherwise would have been delivered under said contract. and such bonds shall be delivered to me by said Continental National bank on the presentation of such joint order as aforesaid, such option and right to be exercised by me within five days after being notified in the manner provided in the contract of the right of the said parties therein named to a delivery of bonds pursuant thereto.

It is also hereby expressly provided that in case of the loss of the iron or any part thereof on shipboard between the port of shipment and the port of entry or delivery all payments made on account thereof are to be refunded by said Schepeler & Co. and Baltzer & Taaks as soon as such loss is ascertained.

New York, Sept. 11, A. D. 1868.

W. J. HAWKINS,
President Chatham Railroad Co.

Witness:
JOHN D. WHITFORD.

Served Mar. 28th, 1888, by leaving a copy of this complaint with his excellency Alfred M. Scales, governor of North Carolina.

(Signed) R. H. BRADLEY, *Marshal.*

67 In the Supreme Court, February Term, 1889.

BALTZER & TAAKS
vs.
STATE NORTH CAROLINA.

And now the defendant, by its attorneys, Theo. F. Davidson, atto. gen'l, and Charles M. Busbee, comes into court and moves to dismiss the action and claim of the plaintiffs upon the ground that this court has no jurisdiction of the subject-matter of the action.

(Signed) THEO. F. DAVIDSON,
Atto. General.
C. M. BUSBEE,
Att'ys for Defendant.

Motion of defendant for time to file answer allowed by the court until the end of the term (February term, 1888).

The plaintiff- moves the court that the order heretofore made in this action allowing time to answer be set aside, and that the defendant be required to plead at some early day, to be designated by the court.

(Signed) WHITAKER,
Att'y for Pl'ff-.

18th Ap'l, 1888.

Per curiam :

Defendant allowed till the 20th of May (1888) to answer.

(Signed) DAVIS, *J.*

Apr. 19 (1888).

And thereupon the following answer was filed May 19th, 1888 :

68 *Answer.*

The defendant, reserving to itself all rights of objection and exceptions as to the jurisdiction of this court and as to the sufficiency of the plaintiffs' complaint herein filed, for answer to the complaint says:

I. That the defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph I.

II. The defendant admits the allegations contained in paragraph II.

III. Answering paragraph III, the defendant admits that the General Assembly of said State, at its special session of 1868, passed an "Act to amend the charter of the Chatham Railroad Co.," ratified on the 15th August, 1868, but for the precise terms and provisions of said act the defendant refers to the same as part of this answer.

IV. The defendant admits the allegations contained in paragraph IV, except that defendant has no knowledge or information sufficient to form a belief as to the allegation that said bonds or any

of them were ever known or designated as "high-numbered Chatham bonds."

V. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph V.

VI. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph VI.

VII. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph VII.

69 VIII. Answering the allegations contained in paragraph VIII, the defendant admits and reaffirms that said bonds were and are unconstitutional and void, and that the defendant refuses to recognize their validity, but as to the other allegations in said paragraph the defendant has no knowledge or information sufficient to form a belief.

IX. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph IX.

X. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph X.

XI. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph XI.

XII. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph XII.

XIII. Answering the allegations contained in paragraph XIII, the defendant has no knowledge or information sufficient to form a belief as to the alleged negotiation of said bonds or any of them or of anything connected therewith; and defendant, further answering, says that on the 5th day of March, 1870, the said railroad company, through its president, returned into the treasury of said State sixteen hundred and fifty of said bonds, and thereafter, on the 14th day of October, 1872, returned into the said treasury fifty other of said bonds.

XIV. Answering the allegations contained in paragraph XIV, the defendant has no knowledge or information sufficient to

70 form a belief as to the alleged negotiations of said bonds or any of them or of anything therewith connected or incidental thereto, and defendant denies that the defendant received any benefit therefrom.

XV. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph XV.

XVI. Answering the allegations contained in paragraph XVI, the defendant admits the receipt of the two hundred and ninety-seven bonds mentioned, but defendant denies that at that time they were recognized as valid obligations of the defendant.

XVII. The defendant denies the allegations contained in paragraph XVII, except that defendant admits the receipt of seventeen hundred and three bonds, as hereinbefore admitted; and, further answering, defendant says upon information and belief that the plaintiffs had full notice of the contemplated exchange of bonds by the said railroad company under the provisions of the act of August 15th, 1868, aforesaid and in ample time to have taken action in the premises, as they might

have been advised, and that the consideration of the said two hundred and ninety-seven bonds of the State issued to said railroad company and of all of said issue was the two million dollars of mortgage bonds executed by the said railroad company which upon the exchange aforesaid went back into the hands of said company, and that if plaintiffs ever had any rights or equities whatever in the premises, which the defendant denies, it was against the said railroad company and its said mortgage bonds and not against
71 this defendant; and the defendant upon information and belief says that the plaintiffs did seek to enforce such alleged equity against the said railroad company, which suit was determined adversely to plaintiffs, as hereinafter set out.

XVIII. The defendant denies the allegations contained in paragraph XVIII.

XIX. The defendant denies the allegations contained in paragraph XIX, except that defendant admits that it declines to acknowledge the validity of the bonds issued by defendant under the said act of August 15th, 1868; and, further answering, the defendant says that under and by virtue of a resolution passed at the session 1874–'5 of the General Assembly of said State, found on page 379 of the laws of said session, the committee therein provided for, on or about the 20th day of March, 1875, burned and destroyed, amongst other bonds, the two hundred and ninety-seven bonds described in paragraph XVI of the complaint.

XX. Answering the allegations contained in paragraph XX, the defendant says that no demand was made for the payment of all of the bonds mentioned, but only for one, and that in response to the demand for one hundred and forty of the bonds received from the said railroad company as aforesaid the plaintiffs' attorney was informed that all of said bonds, being two hundred and ninety-seven in all, had long since been destroyed, as hereinbefore alleged.

XXI. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph XXI.

XXII. And for a further and second defence the defendant says that the plaintiffs' alleged cause of action did not arise within
72 three years prior to the institution of this action, and the same is barred by the statute of limitations.

XXIII. And for a further and third defence the defendant says that the plaintiffs' alleged cause of action did not arise within ten years prior to the institution of this action, and the same is barred by the statute of limitations.

XXIV. And for a further and third defence the defendant says that because of the lapse of time since the plaintiffs received the said bonds, if any were received by them, and because of the long acquiescence of plaintiffs in the destruction by defendant of said two hundred and ninety-seven bonds, and because of the failure of plaintiffs to endeavor to assert or prosecute any alleged rights or equity against the defendant, the plaintiffs ought not to be permitted to have or maintain this action against the defendant.

XXV. And for a further and fourth defence the defendant says

that this action is in the nature of a creditor's bill against the defendant, and defendant insists that no such action lies against this defendant.

XXVI. And for a further and fifth defence the defendant says that it was not a party to any of the alleged contracts set out in the plaintiffs' complaint, and that it had no notice or knowledge of the same; that the plaintiffs do not hold or own any valid or legal obligation of the defendant; that the plaintiffs, by suit duly instituted in the circuit court of the United States for the western district of North Carolina against the Raleigh & Augusta Air Line Railroad Company, the Raleigh & Gaston Railroad Com-
73 pany, J. T. Pickrell, Jno. D. Whitford, and William J. Hawkins, sought to recover a certain balance of indebtedness alleged to be due them upon the alleged contracts set out in the complaint, and to have the bonds held by plaintiffs adjudged to be secured by the mortgage executed by the said railroad company to the defendant, and for other relief, all which will more fully appear by reference to the pleadings and proceedings in said suit, which are hereby referred to as part of this answer; that said suit was determined in favor of the defendants therein, and that it was adjudged that they were not indebted to plaintiffs upon said contracts or otherwise, and that plaintiffs were not entitled to any relief in the premises; and the defendant insists that the plaintiffs cannot have or maintain this action against the defendant because, by their own confession, they hold no valid or legal bond or other obligation executed by defendant, and by the said judgment it has been determined that they have no valid or legal claim of any sort against the said Chatham Railroad Company, to whom said unconstitutional and invalid bonds were issued by the defendant, nor against the said Raleigh & Augusta Air Line Railroad Co., its successor; and in said suit the said plaintiffs, as defendant, is informed and believes, brought into said court the said bonds and abandoned and surrendered the same as worthless paper.

Wherefore the defendant prays to be hence dismissed with its costs, &c.

THEO. F. DAVIDSON, *Atto. Gen'l,*
C. M. BUSBEE,
Attorneys for Defendant.

74 Alfred M. Scales, being duly sworn, says that he is the governor of the State of North Carolina, and that the foregoing answer is true of his own knowledge except as to those matters stated on information and belief, and those he believes to be true.

(Signed) A. M. SCALES.

Sworn and subscribed before me.
Raleigh, May 19th, 1888.
[L. S.] (Signed) THOS. S. KENAN, *S. C. C.*

Case was continued from term to term until February term, 1889, when it was argued on Feb. 25, 1889, and an *advisari* taken; and at

September term, 1889, the opinion of the court was delivered by Hon. A. S. Merrimon, justice, and filed on Oct. 28th, 1889, as follows:

"The case developed by the pleadings is substantially as follows: 'The Chatham Railroad Company' was a corporation organized under and in pursuance of the statute (Pr. Acts 1860, '61, ch. 129), and the name thereof was afterwards changed by the statute (Acts 1871, '72, ch. 11) to that of 'The Raleigh and Augusta Air Line Railroad Company;' but before this change of name the statute (Acts 1868, ch. 14) provided in favor of this company as follows:

"SECTION 1. The General Assembly of North Carolina do enact, That to enable the Chatham Railroad Company to finish their road, the public treasurer is hereby authorized and directed
75 to deliver to the president of the said railroad company, the coupon bonds of the State of one thousand dollars ($1,000) each, to an amount not exceeding two million dollars ($2,000,000) signed by the governor, countersigned by the public treasurer and sealed with great seal of the State, bearing six per cent. interest, the principal payable at the end of thirty years from the date thereof and the coupons of interest payable semi-annually in such form as the public treasurer may direct—principal and interest payable at such time and place as he may prescribe.

"SECTION 2. Before the public treasurer shall deliver any of said bonds, hereby authorized, the president of said Chatham Railroad Company shall deposit with the public treasurer the coupon bonds of the company, signed by him and sealed with the company's seal for the same amount and bearing the same interest and date, the principal and coupons payable at the same time and place as those of the State hereinbefore directed, to be issued and paid over to the said company and to secure the principal and interest of said bonds, issued by the company, the State of North Carolina shall have, by this act, a lien upon all the estate of the same, real or personal, which they may now have or may hereafter acquire between the point of intersection with Western railroad and the South Carolina State line, including that at both points, together with all the rights, franchises and powers thereunto belonging, or that may hereafter belong to said company, in respect of that portion of
76 their line, which lien shall be more effectually secured by a first mortgage duly executed by said company to the State, and registered in the register's office in the county of Wake and in the office of the secretary of state, and in case of failure of said company to pay the semi-annual interest on their bonds for twenty-four months after such interest shall become due or to pay the principal of said bonds for twelve months after their maturity, the board of internal improvements, for, and in behalf of the State may enter upon and take possession of all the property hereinbefore specified and dispose of the same by sale, so as to protect the State.

"SECTION 3. The Chatham Railroad Company may at any time before maturity, discharge the bonds of said company deposited with the public treasurer by substituting in lieu thereof coupon bonds of the State, or payment in national currency.

"The State bonds thus authorized were issued and delivered to the railroad company mentioned, and this company executed and delivered to the public treasurer for the State its first-mortgage bonds for the like amount and executed its first mortgage to secure the same, as contemplated by the statute just recited, which was duly registered for the purposes therein specified.

"Afterwards, in the course of business, the plaintiffs became the owners of one hundred and forty of the State bonds so issued, receiving the same from a party who bought from them the iron for the railroad of the railroad company mentioned, which iron
77 was placed upon the road. It is conceded that these bonds and all the State bonds so issued were unwarranted by the constitution of this State and are void.

"Afterwards the plaintiffs brought their action in the circuit court of the United States to compel the party from whom they received the bonds last mentioned, the railroad company and others, to pay them for the iron so supplied by them. This action was determined adversely to them in the circuit and supreme courts of the United States. (See Baltzer *vs.* Railroad Company, 115 U. S. R., 634.)

"About the 15th of August, 1873, as allowed by the third section of the statute above recited and other statutory provisions afterwards enacted, the railroad company surrendered to the public treasurer of the State 1,703 of the invalid State bonds so received by it, and in place of the balance of the 2,000 of them so received by it it delivered to the public treasurer 270 valid bonds of the State, each of the denomination of $1,000, which last-mentioned bonds were burned by the authorities of the State, as was done ordinarily with such bonds when discharged. The defendant alleges that the plaintiffs had full notice of the surrender of the State bonds to its treasurer and of the first-mortgage bonds to the railroad company and might have interposed and set up in opposition thereto their claim, but failed to do so, &c.

"The plaintiffs, among other things, allege in their complaint as follows:

78 "XVIII. And these plaintiffs further state upon information and belief that the said 297 valid coupon bonds of the State thus deposited are a trust for the benefit of the holders of the said 297 high-numbered bonds, and are not and never have been the property of the said State, and that the said State is in no way entitled to the use and benefit thereof, but said State holds them only as a trust for those who advanced the consideration upon the faith of the validity of the said high-numbered bonds, and that it received the said valid bonds and held them subject to the trust as aforesaid, and that they are in fact the property of these plaintiffs and of other holders of outstanding high-numbered bonds, and that said State has no right, title, or claim thereto.

"XIX. And these plaintiffs further state upon information and belief that the said State has obtained and holds the said valid State bonds deposited with it in the aforesaid exchanges and substitution without parting with any value whatever other than the original

issue of high-numbered bonds claimed to be invalid as aforesaid, and that the State has at all times declined to acknowledge the validity of the said high-numbered State bonds and still continues to so decline, and that the said deposit is in law and equity a deposit of the said valid State bonds in trust for the benefit of the plaintiffs and the other holders of the said high-numbered State bonds, and that the said State is accountable to these plaintiffs for their *pro rata* share of the valid bonds thus as aforesaid deposited.

79 "The defendant alleged numerous grounds of defence.

"The pleadings are very voluminous, but the above statement is sufficiently full for the purposes of a proper understanding of the opinion of the court.

"Before the argument began the counsel for the State moved 'to dismiss the action and claim of plaintiffs upon the ground that this court has not jurisdiction of the subject-matter of the action.'

"The constitution, art. IV, sec. 9, provides that the supreme court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action. This provision constituted part of the constitution as established in 1868 and gave this court such jurisdiction generally of claims against the State. It was afterwards, in the year 1880, modified by an amendment of the constitution, art. I, sec. 6, which provides, among other things, as follows: Nor shall the General Assembly assume to pay or authorize the collection of any tax to pay, either directly or indirectly, expressed or implied, any debt or bond incurred or issued by authority of the convention of the year 1868, nor any debt or bond incurred or issued by the legislature of the year 1868, either at a special session of the year 1868 or at its regular sessions of the years 1868, '69, and 1869,-'70, except the bonds issued to fund the interest on the old debts of the State, unless the proposing to pay the same shall have first been submitted to the people and

80 by them ratified by the vote of a majority of all the qualified voters of the State at a regular election held for that purpose.

"This amendatory clause was interpreted by this court in Horne *vs.* The State, 84 N. C., 362, in which it was held that the court's jurisdiction of claims against the State was so abridged as that it did not thereafter have jurisdiction of a class of claims coming within the inhibition of the clause last above recited. The ground of that decision is that, inasmuch as the General Assembly was prohibited by the constitution 'to assume or pay or authorize the collection of any tax to pay, either directly or indirectly, expressed or implied, any debt or bond' of the class specified, it would be an act of supererogation, an act obnoxious to the charge of presumption for this court, in the face of the unmistakable will of the people, declared in the organic law of the land, to recommend to the legislature the payment of this claim. That case was well considered, and it seems to us that it is in entire harmony with the spirit

and effect of the clause of the constitution interpreted, and indeed a necessary consequence growing out of it. It would be idle, futile, and ridiculous for this court to declare and adjudge the validity of a claim against the State and recommend to the General Assembly to provide for its payment, when the constitution expressly forbids it to pay or provide for the payment of such a claim. The obvious purpose of the jurisdiction so conferred is to have the court settle and adjudge the legal validity of claims, to the end the legislature may provide for their payment. But wherefore adjudge
81 that a claim is valid if the legislature cannot provide for its payment? The purpose and the jurisdiction are swept away by the amendment mentioned as to the claims embraced by it.

"If, then, the claim of the plaintiffs comes within the inhibition last mentioned of the constitution the court has not jurisdiction of it and the motion of the counsel of the State to dismiss the action must be allowed. Does the claim come within that inhibition? We think it does, and for the reason we will now proceed to state.

"It was properly conceded that what purported to be two thousand bonds of the State, each of the denomination of one thousand dollars, issued and delivered to the Chatham Railroad Company were nullities and of themselves created no obligation upon the State to pay them, and that they come within the inhibitory clause of the constitution mentioned. They are therefore not within the jurisdiction of the court.

"The plaintiffs in the course of business took and have one hundred and forty of such bonds, representing one hundred and forty thousand dollars and the interest due thereon. Their claim, however, as they contend, is not founded directly, if at all, upon them, but they contend that they were entitled in equity to have the money they represent paid to them out of the proceeds of the sale of the first-mortgage bonds of the railroad company deposited with the State to indemnify it against loss if it should have to pay
82 the invalid bonds. They contend, further, that inasmuch as the railroad company returned to the State its invalid bonds mentioned except two hundred and ninety-seven of them, and as to these it paid to the State in lieu of them their face value in other valid bonds of the State, which the State received and burned in the course of its practice as to its bonds paid and discharged, and inasmuch as therefore the State returned and surrendered to the railroad company its first-mortgage bonds mentioned, they are entitled to have the State pay the money so due them. They insist that the State paid nothing for its valid bonds to the amount of two hundred and ninety-seven thousand dollars paid to it by the railroad company in lieu of its first-mortgage bonds for the same amount and in substitution for two hundred and ninety-seven of the State's invalid bonds mentioned not surrendered; that the State so received its valid bonds as and in contemplation of law they constituted a trust fund for the benefit of the holders of the outstanding two hundred and ninety-seven invalid bonds.

"We express no opinion as to the correctness of this contention of the plaintiffs. Whatever may be their equitable rights we think it

clear that the State did not intend to receive its valid bonds in lieu of its invalid ones and in substitution for the same amount of the first-mortgage bonds of the railroad company and to hold and treat them as a trust fund for the plaintiffs and others having like
83 claims. There is neither statute nor other legislative declaration showing such purpose in terms or by reasonable implication. The contrary appears. At the time the valid bonds were so received by the State there prevailed great public confusion and financial distrust growing out of disorders resulting from the late civil war and the notorious, reckless, and fraudulent legislation of the years 1868 and 1869. We know this from the clear history of that time in this State as well as from the enactments of the legislature themselves. The valid bonds of the State had no settled value. They were sold in the market for prices purely speculative. In such time of public distress and discontent no one could foresee when or how the valid debt of the State could be paid. No one expected that its void bonds, many of them tainted with the grossest fraud, would be paid at all.

"While the State, through its constituted authorities, soon after their issue regarded and treated the bonds issued to the Chatham Railroad Company as invalid, it was apprehended not unreasonably that they might be purchased innocently in some instances in the course of business at some price, and in other instances by mere speculators in the markets, who would insist upon their validity and payment, and that the State would be greatly annoyed and harrassed in a variety of ways, putting it to great trouble and expense to defend itself against such unfounded claims. In view of this state of things the valid bonds were so received, not for the purpose of paying directly or indirectly the invalid ones, but to indemnify
84 the State against costs and expenditures incurred in resisting them; hence the valid bonds were treated as the absolute property of the State and burned, having served their final purpose. The intention was not to provide a fund to pay the invalid bonds, but to guard against them ever thereafter.

"In view of such purpose can there be a reasonable doubt that the inhibitory clause of the constitution under consideration was intended to embrace not only the invalid bonds themselves, but as well and as certainly every claim and liability, legal or equitable, founded upon, growing out of, or substituted for them? In view of that purpose, if the General Assembly should pass an act providing for the payment of the plaintiffs' claim, would not such an act in legal contemplation and effect provide for such indirect payment of the invalid bonds held by the plaintiffs as is prohibited? Can it be that the inhibition intends to leave the General Assembly at liberty to provide for paying the equitable claims substituted for the invalid bonds held by the plaintiffs? Can this be, in the absence of any provision to that effect, and the further fact that the State disposed of, surrendered, the first-mortgage bonds of the railroad company and treated as its own property its valid bonds substituted for them, as to which the plaintiffs' alleged equity arises? We think not.

"The purpose of the inhibitory clause is very comprehen-
85 sive. It contains but a single exceptive provision and that is in express terms. The terms employed in it are as broad and sweeping as they can be. The language is, 'Nor shall the General Assembly assume or pay or authorize the collection of any tax to pay, either directly or indirectly, expressed or implied, any debt or bond incurred or issued, &c.' By the terms 'any debt' so employed is not meant a debt in a technical sense as to form and character, but, in a general sense, that of any liability incurred to pay money to a party claiming it—that of a claim. Now, if the plaintiffs' claim (their debt, in a general sense) exists and is well founded and the State is liable for it, — is bound in equity or otherwise to pay it. Such liability was incurred by the General Assembly in 1868 because the contract constituting the groundwork of it and out of which it springs was then concluded and made effectual. The statute cited, authorizing the exchange of bonds between the State and railroad company, was enacted in August of that year. The exchange was made and the liability now insisted upon was incurred then, if at all.

"The studied comprehensiveness of the inhibition further appears from the other words, 'to pay, either directly or indirectly, expressed or implied, any debt or bond incurred or issued,' &c.—that is, such debts or bonds shall not be paid as such, nor shall they be paid in any way 'indirectly,' as under the guise or semblance of another debt or bond or transaction, or any other substituted liability
or obligation growing out of the debt or bond or arising
86 otherwise, whether such indirect payment be 'expressed' in terms or in any way 'implied.' The comprehensive purpose is to prohibit and prevent the payment of the debts and bonds referred to in any possible way unless with the sanction of the people expressed by a majority of the qualified voters of the State.

"It is no sufficient answer to what has been said to say that the plaintiffs do not ask the State to pay its invalid bonds held by them; that they only ask it to pay their claim on the ground that it is properly chargeable in equity for their benefit, with its valid bonds which it received from the railroad company as above explained in lieu of part of its invalid bonds and in place of part of that company's first-mortgage bonds, all of which were improperly surrendered to it by the State, and out of which they were entitled to have their claim satisfied as they contend. This argument is without force because, as we have already seen, the State held and treated the first-mortgage bonds of the company as for its sole benefit; surrendered them to the company, receiving in lieu of them part of its invalid bonds and certain of its valid bonds, which latter it held and treated as its absolute property and burned them, thus clearly showing that it did not recognize its liability in any way to pay the plaintiffs' claim or any claim like it. In pursuance of its agreement with the railroad company it received and intended to receive its
valid bonds in the place of its invalid ones. To pay the
87 valid ones thus received would, it seems to us, in contemplation of the inhibitory clause under consideration, be to pay

indirectly the invalid ones they represent whether the purpose be expressed or implied. We cannot doubt that the purpose is to forbid and prevent such payment. Hence, without reference to the merits of the plaintiffs' claim in any aspect of it, this court has not jurisdiction thereof.

"It was contended on the argument that the inhibitory clause of the constitution which we have applied is inoperative and void as to the plaintiffs because it denies and destroys their remedy and is therefore in conflict with the Constitution of the United States. This contention is unfounded. Parties cannot sue or have their action against the State except as the same may be allowed by the constitution or statute, and they must accept and have their judicial remedy against it only in the cases and as to the matters and causes of action prescribed.

"The remedy prescribed and allowed by the constitution, art. IV, section 9, invoked by the plaintiffs, is not a judicial remedy in any proper sense. This court has, by virtue of this provision, jurisdiction 'to hear claims,' but its decisions as to them are not conclusive, but are merely recommendatory. No process, final or otherwise, can be issued upon them. The court has no authority to enforce them in any way. The simple purpose is to have the court decide that such claims are legal or illegal in proper cases.

88 "This court decided in Horne *vs.* The State, *supra*, that an abridgement of its jurisdiction as to claims against the State, even after suit has been brought, was not inhibited by the Constitution of the United States. That case followed and cited with approval, Railroad *vs.* Tennessee, 101 U. S. Rep., 337; Railroad *vs.* Alabama, *ibid.*, 832, both these cases being almost directly in point.

"We think we ought to add that if the facts as they appear strongly in the pleadings are indeed such, the plaintiffs' claim as against some party is one of real merit. They supplied the iron now on the railroad of the company mentioned, and it seems they have been paid but a small part of the large sum of money it cost them. We do not mean to intimate that the State is liable, legally or otherwise, for their debt, but surely some party ought to pay it.

"The motion to dismiss the claim must be allowed. It is so ordered."

MERRIMON, *J.*

89 WAKE COUNTY:

North Carolina Supreme Court, September Term, 1889.

HERMAN R. BALTZER and WILLIAM G. TAAKS *vs.* STATE OF NORTH CAROLINA. } No. 114. Judgment.

This cause coming on to be argued upon the record of the original action, it is considered and adjudged by the court here that according to the opinion of the court, as delivered by the Honorable A. S.

Merrimon, justice, the motion of defendant to dismiss the action be allowed; and it is considered and adjudged further that the plaintiffs, Herman R. Baltzer and William G. Taaks, do pay the costs of the action in this court incurred, to wit, the sum of fifteen dollars and ninety cents ($15.90), and let execution issue therefor.

90 North Carolina Supreme Court.

I, Thos. S. Kenan, clerk of the supreme court of the State of North Carolina, do hereby certify the foregoing to be a full, true, and correct transcript of the record in the action entitled Hermann R. Baltzer and William G. Taaks against The State of North Carolina as appears of record in this court.

In witness whereof I have hereto set my hand and affixed the seal of said court, at office, in Raleigh, this the sixteenth day of September, 1891.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN, *S. C. C.*

Endorsed on cover: Case No. 14,860. North Carolina supreme court. No. 301. Hermann R. Baltzer and William G. Taaks, plaintiffs in error, *vs.* The State of North Carolina. Filed September 25, 1891.

161 US 240

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161-240

Supreme Court of the United States.

No. 93. October Term, 1895.

HERMANN R. BALTZER,

Plaintiff in Error,

vs.

THE STATE OF NORTH CAROLINA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

SIMON STERNE,

Counsel for Plaintiff in Error.

The Evening Post Job Printing House, 156 Fulton St., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1895.

No. 93.

HERMANN R. BALTZER,
Plaintiff in Error,

AGAINST

THE STATE OF NORTH CAROLINA,
Defendant in Error.

Brief for Plaintiff in Error.

Statement.

This case is before this Court on a writ of error to the Supreme Court of the State of North Carolina, in which latter Court there was drawn in question the validity of a certain amendment to the Constitution of the State of North Carolina, on the ground that the same was repugnant to the Constitution of the United States, as being in violation of Section 10 of Article First thereof, which section forbids any State to pass any law impairing the obligation of contracts.

The plaintiff in error herein brought an action against the State of North Carolina, in the Supreme Court of that State, on a bond issued by the State, and worded as follows (Record, p. 1):

"UNITED STATES OF AMERICA.

No. 191.

It is hereby certified that the *the* State of North Carolina justly owes to
or bearer one thousand dollars, lawful money of the United States, at the National Bank of the Republic, in the city of New York, on the first day of April, 1898, with interest thereon at the rate of six per cent. per annum, payable half-yearly at the said bank on the first days of October and April in each year from the date of this bond and until the principal be paid on surrendering the proper coupons hereto annexed.

In witness whereof the Governor of the said State, in virtue of power conferred by law, hath signed this bond and caused the great seal of the State to be hereto affixed, and her public treasurer hath countersigned the same at the seat of government of the said State the first day of April, 1868.

Issued under "ordinance to amend the charter of the Chatham R. R. Co." ratified March 11, 1868.

W. W. HOLDEN, [L. S.]
Governor.

Countersigned:
1,000.

D. A. JENKINS,
Public Treasurer."

That 60 interest coupons are thereunto attached which are, save for due dates and numbers necessarily varying, of the following tenor:

"The State of North Carolina will pay to bearer, at the National Bank of the Republic, in the City of New York, on the first day of Ap'l, 1869, thirty dollars on bond for $1,000.

191. D. A. JENKINS,
$30. Public Treasurer."

(Written across the face)—"C. R. R. Co."

Of this bond the plaintiff was, as he claimed in his complaint, and is still the lawful owner and holder for value.

None of the interest coupons attached to plaintiff's bond has been paid, and the total sum which had become due upon said bond, according to the

tenor of the coupons attached thereto, down to the first day of October, 1890, was $1,320. The action was brought in February, 1891, to recover such sum of $1,320, with interest thereon computed as from the first day of July, 1879, that being the average due date of the defaulted interest payments.

The affirmative defenses pleaded by the defendant in its answer were that the bond was issued without any lawful authority, and that such want of authority affected the interest charge as well as the principal; that the amendment to the Constitution of the State which was submitted by the Legislature of 1879 to the people of the State of North Carolina, and by them adopted in 1880, in words following (Record, p. 3):

> "Nor shall the General Assembly assume or pay or authorise the collection of any tax to pay, either directly or indirectly, expressed or implied, any debt or bond incurred or issued by authority of the convention of the year 1868, nor any debt or bond incurred or issued by the Legislature of the year 1868, either at the special session of the year 1868 or at its regular sessions of the years 1868-'69 and 1869-'70, except the bonds issued to fund the interest on the old debts of the State, unless the proposing to pay the same shall have first been submitted to the people and by them ratified by the vote of a majority of all the qualified voters of the State at a regular election held for that purpose."

was a valid amendment to the State Constitution, and was a bar to the action brought herein. And the answer further interposed as a defense the Statute of Limitations, alleging that the right of action had not accrued within three years and ten years respectively.

Upon the pleadings, and without trial, a motion was made to dismiss this action on the ground that the Court had no jurisdiction thereof. This motion to dismiss, inasmuch as it was based wholly upon the constitutional amendment of 1880, was met by the plaintiff by the allegation on the record that the alleged amendment to Section 6 of Article 1 of the

State Constitution, adopted in the year 1880, was repugnant to the Constitution of the United States, because it impairs the obligation of contracts, and was, therefore, void (see Record, page 16), and that such enactment, which attempted to repudiate and forbid payment of the bond described in the complaint, being in such manner repugnant to the Constitution of the United States, was, therefore, not properly a law of the State of North Carolina.

Thereupon the action was dismissed by the Supreme Court, the opinion delivered by Judge Merrimon holding that the Court had been deprived of jurisdiction by the constitutional amendment and on the grounds theretofore decided in Horne *vs.* The State, 84 North Carolina, 462, and Baltzer & Taaks *vs.* The State, 104 North Carolina, 265. The decisions in those cases held that this amendment was a valid amendment to the Constitution of the State of North Carolina, and that it did not impair the obligation of contracts, and the decision, therefore, was against the contention of the plaintiff, who invoked the protection of the Constitution of the United States for the contract which he had with the State of North Carolina and which was embodied in his bond.

The Constitution of the State of North Carolina contains a provision as follows, being Section 9 of Article IV. thereof:

> "CLAIMS AGAINST THE STATE. The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action."

This provision became part of the Constitution of the State of North Carolina at the time of the issuing of the bond in question (Section 11 of Article IV. in previous State Constitution). It was incorporated into the State Constitution by the very convention of 1868, which enacted the measure that authorized the issue of the bonds in question.

In the cases referred to by the Supreme Court the interpretation that was given to the Constitutional Amendment as to its operation upon the right to sue on any of the obligations referred to in such amendment, and intended to be repudiated thereby, was substantially that inasmuch as the Court's judgment was merely advisory and recommendatory, and that by such judgment no final payment could be ordered, but the intervention of the Legislature was still required for such payment, a constitutional prohibition which prevented the Legislature from acting on the recommendation of the Supreme Court in a particular case made the decision of the Supreme Court a vain and nugatory thing, and that, therefore, inferentially the Supreme Court was divested of the authority to consider the case, inasmuch as the result of such consideration could not accomplish the purpose of the recommendation. That consequently, by inference, the Supreme Court was divested of jurisdiction under the Constitution as it stood before such amendment had been passed, in all cases of bonds mentioned in the Constitutional Amendment of 1880. And hence, without regard to the questions that were raised by the pleadings, other than that of the Constitutional Amendment, they dismissed the complaint.

For the purposes of this writ of error, therefore, the allegations of the complaint, except those referring to the invalidity of said Constitutional Amendment, must be taken as true, and plaintiff's bond to embody a valid contract between him and the State.

This raises the question clean cut: Was the constitutional amendment of 1880 a violation of the contract between the State and its creditors, who were purchasers for value of the bonds mentioned in the constitutional amendment and were not the substantial rights of all such holders, including the plaintiff in error, impaired by the passage of such constitutional amendment? And if in violation of the contract of the State, was such amendment not directly contrary to the inhibition of Article 1, Sec-

tion 10 of the Constitution of the United States, and therefore void? The holding to the contrary by the Supreme Court of the State is the main assignment of error, to wit: That the said Court, although the plaintiff drew in question the validity of the said constitutional amendment of 1880, on the ground that it was repugnant to the Constitution of the United States, in that it impaired the obligation of contracts, and was therefore unconstitutional and void, overruled the contention of the said plaintiff and decided and adjudged that said constitutional amendment was not repugnant to the Constitution of the United States and was not unconstitutional and void, and that the decision of said Court was in favor of the validity of said amendment; that the said Court held that said amendment barred plaintiff's claim and therefore declined to take further proceedings in plaintiff's cause or to let plaintiff have a trial of the same on the merits, and dismissed the same (see Record, pages 5–7).

The ordinance authorizing the issue of the bonds is in language following, to wit:

"AN ORDINANCE TO AMEND THE CHARTER OF THE CHATHAM RAILROAD COMPANY.

SECTION 1. Be it ordained by the people of North Carolina, in convention assembled: That to enable the Chatham Railroad Company to finish its road, the Public Treasurer is hereby authorized and directed to deliver to the president and directors of the said railroad company the coupon bonds of the State to an amount not exceeding twelve hundred thousand dollars ($1,200,000), signed by the Governor, countersigned by the Public Treasurer and sealed with "the Great Seal of the State," bearing six per cent. interest, the principal payable at the end of thirty years from the date thereof, and the coupons of interest payable semi-monthly, in such form as the Public Treasurer may direct, to be made payable at such time and place as may be agreed upon by the Public Treasurer.

SEC. 2. Be it further ordained, That before the Public Treasurer shall deliver any of said bonds hereby authorized, the said Chatham Railroad Company (shall deposit) with the Public Treasurer the coupon bonds of said company for the same amount and bearing the same interest and date, the principal and coupons payable at the same time and place as those of the State hereinbefore directed to be issued and paid over to the Chatham Railroad Company, and to secure the principal and interest of said bonds issued by the Chatham Railroad Company the State of North Carolina shall by this ordinance have a lien upon all the estate of said company, both real and personal, which they may now have or may hereafter acquire, between the City of Raleigh and the Gulf, the terminus of said railroad in the coal fields, including that at both points, together with all the rights, franchises and powers thereunto belonging or appertaining, or that may hereafter belong or appertain to said company, which lien shall be more effectually secured by a first mortgage duly executed by said company to the State and registered in the Register's Office in the Counties of Wake and Chatham; and in case of failure of said company to pay the semi-annual interest on its bonds for twenty-four months after such interest shall become due, or to pay the principal of said bonds for twelve months after their maturity, the Board of Internal Improvements for and in behalf of the State may enter upon and take possession of all the property hereinbefore specified and dispose of the same by sale, so as to protect the State.

SEC. 3. Be it further ordained, That the Chatham Railroad Company may at any time before maturity take up the bonds of said company deposited with the Public Treasurer by substituting in lieu thereof coupon bonds of the State, or other indebtedness of the State.

SEC. 4. Be it further ordained, That the State shall have the privilege at any time within eight years from the passage of this ordinance to subscribe stock in said company to the amount of six hundred thousand dollars ($600,000) in shares of one hundred dollars ($100) each, and upon

certificate of stock being issued to the State by said company for the same, to surrender the bonds of said company which had previously been delivered to the State under the provisions of this ordinance.

SEC. 5. Be it further ordained, That this ordinance shall take effect and be in force from and after its passage.

Ratified this 11th day of March, A. D. 1868.

CALVIN J. COWLES,
President.

T. A. BYRNES,
Secretary."

POINTS.

I.

It was error for the Supreme Court of North Carolina to construe the constitutional amendment as a limitation or withdrawal of jurisdiction from that Court, and to thereby defeat the consideration of plaintiff's claim and his procuring such judgment and limited power of enforcement as the constitution of the State of North Carolina had secured to him.

The amendment to the constitution of North Carolina, adopted in 1880, and herein under consideration, does not refer to the judiciary or change the jurisdiction of any Court. By its terms it refers to the Legislature, and is intended to act solely as a restriction upon, and to prevent legislative action in the way of appropriation, or authorizing the levying of a tax to pay any of the bonds mentioned in said amendment.

The language of the amendment expressly sets this forth as follows:

> "Nor shall the General Assembly assume or pay or authorize the collection of any tax to

> pay, either directly or indirectly, expressed or implied, any debt or bond incurred or issued by authority of the convention of the year 1868, nor any debt or bond incurred or issued by the Legislature of the year 1868, either at the special session of the year 1868, or at its regular sessions of the years 1868–'69, 1869–'70, except the bonds issued to fund the interest on the old debts of the State, unless the proposing to pay the same shall have first been submitted to the people, and by them ratified by the vote of the majority of all the qualified voters of the State at a regular election held for that purpose."

We find here no reference to the Supreme Court or any other Court, nor even the smallest indication of any intention to change the jurisdiction of the Supreme Court of North Carolina in respect to the trial of claims against the State. That jurisdiction is given by the North Carolina constitution, Article 4, Section 9:

> "Claims against the State. The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory: no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assemby for its action."

This article of the Constitution was in no way changed or amended. The amendment in question is to Section 6, Article 1, which, before the adoption of the amendment, read as follows:

> "The *State* shall never assume or pay, or authorize the collection of any debt or obligation, express or implied, incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave."

To this section the amendment added:

"Nor shall the *General Assembly* assume or pay," &c., &c.

This clearly shows an intention to restrict legislative action and not to change any judicial procedure or jurisdiction of any Court. Practically this has been held by the North Carolina Supreme Court itself—the highest Court of the State—even where the language used by the Court in its decision seems to imply the contrary.

See Baltzer & Taaks *vs.* State, 104 N. C., 265, at p. 271.*

It was claimed by the State Court that its jurisdiction would be nugatory in the case of a claim against the State which the legislature is forbidden to pay; that it would be "idle," "futile," and even "ridiculous" for the Supreme Court to "declare and adjudge the validity of a claim against the State and recommend to the General Assembly to provide for its payment, when the Constitution expressly forbids it (that is, the General Assembly) to pay or provide for the payment of such a claim."

See Baltzer & Taaks *vs.* State, 104 N. C., 265, at p. 271.

But this has nothing at all to do with the question of whether the enactment by which the Legislature is forbidden to pay such claim is, or is not valid. It is one thing to say that the effect of the constitutional amendment is to make action by the Supreme Court of North Carolina useless, and quite another thing to hold that the constitutional amendment, considered as a bar upon the Legislature, is a valid enactment. The State Court may have had a show of justification in holding that it would be folly for it to recommend to the Legislature the payment of a claim which that body is, by a constitutional provision forbidden to pay, and that, therefore, by inference, the jurisdiction of the State Court was, by such constitutional provision, taken away. But the effect of this amendment upon the jurisdiction of the Court is by this very reasoning a purely secondary and inferential effect, and must stand or fall ac-

* The decision in this case will be found in full in the Record in Case No. 52, pages 36–42.

cording as such enactment is or is not held to be a valid restriction upon the State Legislature. It was a grievous error, therefore, as well as wrong on the part of the Court of last resort in the State of North Carolina, to say that a constitutional provision which operates upon the Legislature alone, and not upon the Courts, deprives the creditor from a resort to the Courts, first, on the assumption that the amendment is an entirely valid one, considered as to its action upon the Legislature, and secondly, upon the assumption that it being valid there is no force or value in a judgment which gives to the creditor a mere recommendation to the Legislature to pay what that body is so constitutionally prevented from paying.

That the Supreme Court of North Carolina committed this error, and was influenced in its decision to dismiss this cause purely by the consideration of the effect of the constitutional amendment upon the power of the Legislature to pay the particular debts mentioned in the amendment, and, consequently, of the inadvisability and uselessness of the Court's recommending their payment, will be seen by the most cursory reading of the decision of that Court, in the cases referred to.

See

Baltzer & Taaks *vs.* The State, 104 N. C., 265, at pp. 270 and 271;

Horne *vs.* The State, 84 N. C., 362,

which latter case, though seemingly against plaintiff's contention, is, as a matter of fact, in point. At page 364 the Court says,

> "We take the distinction to be this, that when the Legislature may, by act or resolution, direct the Treasurer of the State to pay a claim against the State, there the Supreme Court has jurisdiction, but when the Legislature is prohibited by the constitution from the exercise of such power, and can only order the payment after obtaining the assent of the people by a popular vote, then it does not have jurisdiction."

In other words, if this amendment is a valid restriction upon the *Legislature* the Court will refuse to act. If it is not a valid restriction upon the Legislature, the Court's jurisdiction remains. The only ground, therefore, of the entire futility, as the Court claims, of its intervention, and consequently of its refusal to take jurisdiction of the case, rests wholly on the assumption that the inhibition of the constitutional amendment is operative and valid, and absolutely prevents the Legislature of the State of North Carolina from passing the necessary laws to pay this bond. Had the Court, on the contrary, assumed, as it was bound to do, that the Legislature as well as itself would recognize the invalidity of the constitutional amendment, and therefore act as though it had never been passed, then there would have been clearly no "futility," and no "folly," and no "idle" performance on the part of the Supreme Court to declare this bond of ours good, and to recommend to the Legislature that which it had a perfect right to do, on the assumption that the constitutional amendment was invalid.

That the decision of the State Court in holding this amendment to be a valid restriction upon legislative action is error will be hereinafter shown at length, and is at present not further touched upon because this preliminary question as to the scope of the constitutional amendment must first be disposed of. The first and fundamental error of the State Court was that it construed the amendment to be a valid withdrawal of its own jurisdiction, instead of an invalid attempted limitation upon the Legislature, which being so invalid could not affect the jurisdiction of the Court.

II.

It follows that the adoption of this constitutional amendment is not an exercise of the right of a State, being a sovereignty, to prescribe the conditions under which it can be sued, or to withdraw altogether its consent to be sued in its own courts; and that it was error for the State Court to construe the enactment of the constitutional amendment to be an instance of the exercise of such right.

In the case of

Baltzer & Taaks v. *The State*, 104 N. C., 265,

referred to by the Court in this case as controlling, the Court said (at p. 277):

> "This Court decided in Horne against The State that the abridgement of its jurisdiction as to claims against the State, even after suit has been brought, was not inhibited by the Constitution of the United States. That case followed and cited with approval Railroad *v.* Tennessee, 101 U. S. Rep., 337; Railroad *v.* Alabama, *ibid*, 832, both of these cases being almost directly in point."

and again (at p. 276):

> "Parties cannot sue or have their action against the State except as the same may be allowed by the Constitution or statute, and they must accept and have their judicial remedy against it only in cases and as to the matters and causes of action prescribed."

The general principle thus enunciated is not for a moment questioned or denied by these plaintiffs. That a State is a sovereignty, and as such can prescribe the terms on which it will consent to allow itself to be sued in its own courts, or can withdraw

such consent altogether whenever it so desires, cannot be doubted, and has been held by this Court in a long line of decisions (Beers *v.* Arkansas, 20 How. (U. S.), 527; *in re* Ayres, 123 U. S., 443, and cases therein cited).

Such, too, has been the decision of the Supreme Court of the United States in the cases referred to by the North Carolina Court (Railroad *v.* Tennessee, 101 U. S., 337, and Railroad *v.* Alabama, 101 U. S., 832). An analysis of these cases must show, however, that they decide quite a different question than the one at issue here. Taking the case of the Railroad Company *v.* Tennessee (above) as typical, the facts as given in the report were as follows (p. 337):

> "The Constitution of Tennessee in force in 1838 declares that 'suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.' *The statute of 1855, providing that actions might be instituted against the State under the same rules and regulations that govern those between private citizens, but conferring no power on the courts to execute their judgments was repealed in 1865.* No other law was enacted prescribing the manner or the courts in which the State could be sued. In a suit subsequently brought by the State in 1872 against the Bank of Tennessee and certain of its creditors, A, who was admitted a defendant, filed a cross-bill, setting up that while the first statute was in force the bank became indebted to him, and praying that under the indemnity clause of its charter a decree be rendered against the State for the amount of the debt. The cross-bill was dismissed solely upon the ground that the State could not be sued in her own courts;"

It was held, that the act repealing the statute of 1855 was not unconstitutional as impairing the obligation of contracts; that the State has the right to withdraw its consent to be sued, and that the Federal Court cannot interfere with the exercise of such right.

The plaintiff concedes everything that is said in

these cases by the Court, which, it will be noticed, is speaking purely of the repeal of the judicial remedies against a State furnished by such State by its own laws. It is admitted as a general proposition of law—although we shall hereafter show that, in this particular case, even a repeal of the judicial remedy would have been incompetent as far as the bond in suit is concerned—that if the State of North Carolina had adopted an amendment to its Constitution repealing Section 9 of Article 4 thereof, before quoted, such act could not have been inquired into or disturbed by this Court; that it would have been an exercise of the right of a State to secure to itself immunity from suits, if it so desired; and that is all that is decided by the Tennessee and Alabama cases above cited.

But nothing of the kind was done in the case at bar. No enactment providing for judicial proceedings against the State was changed, amended or repealed; nor was the constitutional provision referring to such proceedings disturbed. The provision of the North Carolina Constitution (Article 4, Section 9), referring to suits against the State, is in full force and effect to-day just as much as it ever was before, and the State Supreme Court still has full power to take cognizance of claims against the State. Even assuming, therefore, that the State had in this case the power of taking away the judicial remedy against itself which it had itself given, the Court below erred in construing the constitutional amendment of 1880 to be such a taking away of a judicial remedy. All that the plaintiff contends, consequently, is that he should be allowed to proceed in accordance with the provisions of Article 4, Section 9, of the North Carolina State Constitution, which is still in full force and effect, and that this Court should remand the cause to the Supreme Court of North Carolina with directions to let the same proceed without regard to the amendment to Section 6 of Article 1 of the North Caro-

lina Constitution, which, as plaintiff alleges and will show, is repugnant to the Federal Constitution.

The misapprehension of the North Carolina Court as to the bearing of the cases by it cited, and above distinguished, was the natural result of the confusion apparent in its decision between the primary effect of the amendment considered as a restriction upon legislative action, and its purely secondary and inferential effect as a deterrent to the assumption of jurisdiction by the State Court.

It will be found, on an examination of the cases referring to the question of suits by individuals against the State, that in no instance do they go further than to lay down the principle which, considered as a general principle of law apart from the particular facts of this case, is conceded by the plaintiff, to wit, that the *judicial* remedies given by a State against itself, in its own courts, if such remedies are not part of a specific contract with the State, can be taken away. Immunity from suits can be secured without impairing the obligation of contracts (see Beers *v.* Arkansas, 20 How. (U. S.), 527; Poindexter *v.* Greenhow, 114 U. S., 270; Hans *v.* Louisiana, 134 U. S., 1; North Carolina *v.* Temple, 134 U. S., 22).

III.

The amendment to Section 6 of Article 1 of the Constitution of North Carolina impairs the obligation of contracts, is in conflict with the Constitution of the United States, and is, therefore, totally null and void, and it was error for the State Court to hold otherwise.

Having established the fact that this amendment cannot be considered as taking away a judicial remedy against the State, we are now in a position to consider it purely as an enactment by the State

seeking to repudiate certain bonds issued by it and depriving the State Legislature of the power of paying the same.

"No State shall * * * pass any * * * law impairing the obligation of contracts."

Constitution of the United States, Article 1, Section 10.

It is claimed by the plaintiff that this provision of the Federal Constitution which deprives the States of the power to pass any law impairing the obligation of contracts has been infringed by the adoption of the constitutional amendment before mentioned.

(*A.*) *This constitutional amendment impairs the obligation of the contract to pay, contained in every bond embraced in its provisions, including the bond in suit, because it takes away from the State representatives the power of carrying out such contract.*

It is true that it does this only conditionally, that is, unless the people of the State in the method defined in the amendment specially authorize such payment; but if to forbid absolutely the payment would be illegal, then clearly this conditional prohibition of payment is equally illegal; for, so long as the condition is not performed, the prohibition, and, consequently the repudiation, are absolute.

After the contract has been made and the bonds are in the hands of *bona fide* holders for value, it changes the bond so that it no longer reads that the State will pay absolutely, but that it will pay provided a proper vote can be obtained in favor of such payment. This is not permissible.

> "The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating, the period of performance which it prescribes, *imposing conditions not expressed in the contract, or*

dispensing with the performance of those which are, however, minute or apparently immaterial in their effect upon the contract, impairs its obligation."

Green v. *Biddle*, 8 Wheaton, 1, at p. 84.

See, also,

Bronson v. *Kinsie*, 1 Howard, 311.

Planters' Bank v. *Sharp*, 6 Howard, 311,

where it is said, at page 327:

"One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not by the constitution to be impaired at all. It is not a question of degree or manner or cause, but of encroaching in any respect upon its obligation, dispensing with any part of its force."

Any law passed by a State withdrawing from its officers the power of carrying out the contract embraced in its bonds and coupons or certificates of indebtedness is unconstitutional as impairing the obligation thereof.

On that point, all the cases, even those that refuse a remedy on the ground that the State cannot be sued, are unanimous.

See:

Louisiana v. *Jumel*, 107 U. S., 711;
Antoni v. *Greenhow*, ib., 769;
Hartman v. *Greenhow*, 102 U. S., 672;
Virginia Coupon Cases, 114 U. S., 270;
In Re Ayres, 123 U. S., 443.

The provision of the Federal Constitution regarding the impairment of the obligation of contracts applies equally to contracts by a State and to contracts by individuals.

See cases above cited, and

Hagood v. *Southern*, 117 U. S., 52;
Hans v. *Louisiana*, 134 U. S., 1;
United States v. *Mayor of New Orleans*, 103 U. S., 358.

It makes no difference that by enacting a law impairing the obligation of contracts, a State may not necessarily make itself liable to suit. The question at issue here is, does the constitutional amendment adopted by North Carolina in 1880 impair the obligation of the contract contained in the bond in suit and in the other State bonds referred to in the amendment? If it does, then it is void.

See *Poindexter* v. *Greenhow*, 114 U. S., 270,

where it is said, at page 286:

> "This immunity from suit, secured to the States, is undoubtedly a part of the Constitution, of equal authority with every other, but no greater, and to be construed and applied in harmony with all the provisions of that instrument. That immunity, however, does not exempt the State from the operation of the constitutional provision that no State shall pass any law impairing the obligation of contracts; for, it has long been settled that contracts between a State and an individual are as fully protected by the Constitution as contracts between two individuals. It is true, that no remedy for a breach of its contract by a State, by way of damages as compensation, or by means of process to compel its performance, is open, under the Constitution, in the Courts of the United States, by a direct suit against the State itself, on the part of the injured party, being a citizen of another State, or a citizen or subject of a foreign State. But it is equally true that whenever, in a controversy between parties to a suit, of which these courts have jurisdiction, the question arises upon the validity of a law by a State impairing the obligation of its contract, the jurisdiction is not thereby ousted, but must be exercised, with whatever legal consequences, to the rights of the litigants, may be the result of the determination. The cases establishing these propositions, which have been decided by this Court since the adoption of the Eleventh Amendment to the Constitution, are numerous. Fletcher *v.* Peck, 6 Cranch, 87; New Jersey *v.* Wilson, 7 Cranch,

164; Green *v.* Biddle, 8 Wheat, 1, 84; Providence Bank *v.* Billings, 4 Pet., 514; Woodruff *v.* Trapnall, 10 How., 190; Wolf *v.* New Orleans, 103, U. S., 358; Jefferson Branch Bank *v.* Skelly, 1 Black, 436."

and again, in the words of this Court, in

Hans. v. *Louisiana*, 134 U. S., 1, at page 20:

"To avoid misapprehension it may be proper to add that, although the obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into court, yet where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted, and *any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment.*"

This is all that the plaintiff contends for. He does not desire to sue the State under any other condition or in any other way except that which the State of North Carolina has itself given. He merely desires a ruling of this Court on the constitutionality of the amendment in question, and if the same is unconstitutional, that the Supreme Court of North Carolina should be directed to disregard it, inasmuch as the State, having had no power to adopt such a constitutional amendment, has, in contemplation of law, not done so.

Poindexter v. *Greenhow*, 114 U. S. 270, at p. 288.

"The obligation of a contract is to be regarded as the duty imposed by it."

Planters' Bank v. *Sharp*, 6 Howard, at p. 327.

Here, that duty, and in that sense "the means of enforcing the contract," is the duty of the Legislature to pay, and that duty, as well as the power to pay, the constitutional amendment in question has taken away. Such amendment is, therefore, in conflict with the Constitution of the United States, and void.

> "The clause of the Constitution which declares that no State shall pass any law impairing the obligation of contracts, prohibits legislation thus affecting contracts between the State and individuals equally as it does contracts between individuals. Indeed, the greater number of cases in which the protection of the constitutional provision has been invoked against subsequent legislative impairment of contracts, has been of those in which the State was one of the contracting parties. Where a State enters the markets of the world and becomes a borrower, she lays aside her sovereignty and takes upon herself the position of an ordinary civil corporation, or of an individual, and is bound accordingly. Davis *v.* Gray, 16 Wall., 203; Murray *v.* Charleston, 96 U. S., 432; Hall *v.* Wisconsin, 103 *Id.*, 5."
>
> *Antoni* v. *Greenhow*, 107 U. S., 769, opinion of JUDGE FIELD, at page 795.

The North Carolina Court intimated in its decision that the contract contained in these State bonds was not such a contract as is included in the constitutional provision prohibiting the impairment of obligation of contracts, on the alleged ground that the State Supreme Court had only an advisory jurisdiction, and inferentially, that there is no real remedy provided for the contract's enforcement (104 N. C., 265, pp. 276 and 277); and the State Court referred to the decision of this Court in the case of *Railroad Company* vs. *Alabama*, 101 U. S., 832, as supporting it in that contention. The language of this Court in that case was as follows:

> " We are unable to see any substantial difference between this cause and that of Railroad Company *v.* Tennessee, *supra*. Under both the Tennessee and Alabama statutes the courts are made little less than auditing boards. If funds are not voluntarily provided to meet the judgment the courts are not invested with power to supply them. In Alabama, a warrant for the payment may be secured, but the State may stop payment by withholding an appropriation. Perhaps the judgment creditor may take one step further towards the collection in Alabama than he can in Tennessee; but both States may refuse to pay, that is, may refuse to make the necessary appropriation, and the *courts* are powerless to compel them to do so. In neither State has there been granted such a remedy for the enforcement of the contracts of the sovereignty as may not, under the Constitution of the United States, be taken away."

To understand this language, however, it must be remembered that it was used not in speaking of the nature of the State's contract to pay, but of the fact that no *absolute judicial remedy* for the enforcement of this contract was furnished by the State laws; and that, therefore, an enactment which repealed the imperfect judicial remedy which was furnished, did not impair the contract's obligation (see pp. 14 and 15). That is conceded as a general principle of law, apart from the facts of this case. The statutes passed upon by this Court in the Tennessee and Alabama cases were repealing statutes, pure and simple—acts that revoked the *quasi* privilege of suit against itself granted by the sovereignty.

The reasoning of these decisions, therefore, does not in any way apply to the present case, in which there is no question of the repeal of any *judicial remedy* whatever. And neither the Tennessee nor the Alabama case went any further than to pass upon the one question of the repeal of a judicial remedy.

If it be contended for the defendant-in-error, however, that the language used by the Court in the

Alabama case, above quoted, applies equally to the nature of the State's contract, then we must take issue with that contention. It cannot be maintained that because (even in the absence of this constitutional amendment) the payment of the bonds by the State would have depended upon the passing of an appropriation by the State Legislature, this is, therefore, not a *contract* which is embraced in the constitutional provision preventing any State from passing a law impairing the obligation of contracts. If such a test were adopted, a case of a binding contract for the payment of money by a State could rarely, if ever, arise,* for in almost every case where a State is under a contractual liability to pay money, an appropriation by the State Legislature and the due setting in motion of the taxing machinery of the State are necessary for its fulfillment. The duty on the part of the State Legislature to make such an appropriation is an essential part of the obligation of the contract; and when the Legislature is forbidden, by an alleged enactment, to perform that duty, the obligation of the contract is impaired.

It is true, that under the law of North Carolina, the Legislature could not be compelled by mandamus to make such appropriation, though to make it would be their *duty*. But that can furnish no reason why the *right* of the Legislature to make such payment should be taken away. The State's contract to pay, as contained in these bonds, has an obligation just as much as the contract of an individual, and this Court will decide any enactment impairing such obligation to be void, without reference to the question whether the State can be sued thereon or not.

> "*The truth is, States and cities, when they borrow money and contract to repay it with inter-*

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* Unless the duty of levying taxes to raise funds to meet the contract, were, by the terms of the contract, imposed upon some ministerial officer, as in the Virginia coupon cases.

est, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity."

Murray v. *Charleston*, 96 U. S., 432.

In that case, the municipality of Charleston (being, for the purpose of the exercise of this right of taxation, the agent of the State Legislature) sought, by an ordinance, to tax certain so-called stock of the City of Charleston—that is, obligations of that city owned by private individuals. It tried to do this in the following way: It passed an ordinance directing that a tax assessed by it on such stock should be retained by its treasurer, out of the interest due on such stock to the holders. This ordinance was held to be void, as impairing the obligation of the contract contained in the stock. It was claimed in that case that the contract between the city and the holder contained in the stock must be interpreted to be subject to the undoubted right of taxation possessed by a sovereignty. As shown by the extract from the decision above quoted, however, this is not so; the United States Supreme Court will hold that, so far as the particular contract is concerned, there is, in itself, an assurance "that such right will not be exercised." Alexander Hamilton had already pointed out that this could not be otherwise, for the contract would, if the opposite contention were supported, "involve two contradictory things—an obligation to do and a right not to do—an obligation to pay a certain sum, and a right to retain it in the shape of a tax. - *It is against the rules both of law and of reason to admit*

by implication in the construction of a contract a principle which goes in destruction of it."

See opinion of STRONG, *J.*, in
Murray v. *Charleston*, 96 U. S., 432.

See also
De Vignier v. *New Orleans*, 16 Fed. Rep., 11.
United States v. *County Court*, 2 Fed. Rep., 1.
New England Mortgage Security Co. v. *Vader*, 28 Fed. Rep., 265, at p. 274.

This is exactly the case at bar. Although the Legislature of North Carolina may or may not pass an appropriation, and cannot be compelled to do so, that being an act of sovereignty, yet when it issues its bonds, those bonds being dependent for payment upon the passing of an appropriation, this Court, following the decision in Murray *v.* Charleston, must hold that in such a case there is implied in the bonds themselves a promise that the appropriation will be passed, and that the right of sovereignty not to pass such an appropriation will not be exercised; that in any event the Legislature will be left free to perform its duty. Consequently, a law which absolutely forbids the Legislature to pass an appropriation to pay such bonds must be held to be void as impairing the obligation of contracts.

The plaintiff in this action is perfectly willing to take his chance of having the State Legislature appropriate money to pay this bond. For that chance and a possible delay in securing an appropriation until the State would be in funds, may properly be considered incident to his contract. But he insists that an enactment which destroys and voids his contract *in toto*, by positively forbidding the Legislature to pay, by taking away its right under the fundamental law of the State to pay, is void as impairing the obligation of his contract with the State. And that contention differs in no way in principle from the contention upheld in Murray *v.* Charleston, and similar cases, above cited.

We should remember, too, that in Democratic constitutional governments it is a matter of general public law that a constitutional convention duly convened embodies the supreme, ultimate power of the people, and its enactments duly adopted operate upon the various general departments of law-making, judiciary and administration of the State, with the same force and effect as the laws of the legislative bodies operate upon the minor departments of the State government. Therefore, upon the same principle which has caused the Supreme Court of the United States to declare void enactments of the Legislature which prevented a ministerial or administrative officer from performing his duty in the payment of a debt or bond of a State, as a violation of the constitutional restriction upon States forbidding them from impairing the obligation of contracts, including their own contracts (Virginia Coupon Cases, above cited), this Court should declare a constitutional amendment, which prevents any one of the great departments of the State from performing a duty that it is fair to assume they would perform in the discharge of the debts of the State but for such inhibition, as equally violative of the provision of the Constitution of the United States which inhibits a State from impairing the obligation of its own contracts. This can no more be done than the State Legislature can forbid the officers of a municipality from performing their duty in relation to the payment of an executed municipal contract.

Then, again, who can say that in a State of the Union, wherein a sensitive public opinion may be presupposed to exist and where a general popular education has developed to a certain degree, at all events, a sense of public and private honor; wherein jails exist for evildoers, and the criminal laws are administered with fairness and impartiality; wherein commercial debts are promptly paid, and men lose caste if they fail in their voluntarily assumed personal obligations, the decision of the Supreme Court of the State, rendered after a careful

examination of all the facts, declaring the State to be indebted to an individual creditor, and recommending the Legislature to make the necessary appropriation for the discharge of that indebtedness, is either a nugatory or visionary thing, or so inadequate that it can be scarcely considered a remedy at all? On the contrary, the action of the Supreme Court of the State sets in motion one of the most powerful instruments and leverages for the redress of grievances in this country, to wit, public opinion, and concentrates such public opinion and brings it to bear upon the Legislature of the State, a body peculiarly sensitive to public opinion; so that a recommendation of the Supreme Court on such a question would, in all probability, practically secure the necessary action on the part of the Legislature.

Therefore, although the debtors of the State were probably powerless to obtain any mandatory process upon the Legislature to compel it to perform its duty to levy the necessary taxes and make the necessary appropriations to discharge the bonded obligations of the State, they were entitled to the right of freedom on the part of the Legislature to perform or not to perform these acts, coupled with the natural assumption that men will perfom their obligations and that representatives of the State will be jealous of the credit and responsive to the moral as well as the legal obligation imposed upon the State to discharge its debts. To forbid them to do this by the greater power of a constitutional amendment is an act of the State to forbid them to perform their duty in the discharge of its obligation, and from that act we are protected by the superior force of the Constitution of the United States.

Let us take as another example—the case of a person who has entered into a contract with a State to supply it with materials for a public building. The materials are furnished; payment therefor, however, depends altogether upon the Legislature providing for such payment by an appropriation. Can it be maintained that an amendment to the

Constitution of the State forbidding the Legislature to provide for such payment, would not impair the obligation of the contract? Surely such a contention would not be supported by this Court.

Suppose, for instance, that in the State of New York the contractors who were building the new State House had delivered stone, iron and other building material towards its construction; that a wave of popular opinion had taken possession of the community to the effect that great frauds had been practiced in connection with the construction of the State House, and that a constitutional convention then in session had, under the influence of this prejudice, passsed a constitutional amendment that the Legislature of the State of New York shall never pass an appropriation which shall recognize an indebtedness on the part of the State arising out of the construction of the new State House, or which shall authorize the levying of a tax for the discharge of such indebtedness. Would not such constitutional inhibition be declared violative of every contract made with the State for the construction of the State House? Under the constitutional provisions of the State of New York no Legislature can be compelled to levy a tax or to make the necessary appropriations for carrying on the expenses of the State government. It has, however, to be assumed under our form of government that men and institutions, both public and private, will perform the duties which they have contracted to perform. The credit is given to the State by one who deals with it, with knowledge of the fact that the judicial machinery of the State is woefully wanting in adequate power to enforce contracts with the State; yet it is given at the same time with the knowledge that men and governments ordinarily perform their functions and duties in good faith and in consonance and conformity with the terms of the contracts that they have made, and that the State administration, being composed of men, is under the impulse of the same moral law and under the influence of the public opin-

ion which enforces it. A constitutional provision, therefore, which prevents a State Legislature from living up to those reasonable expectations on the faith of which the contract with the State is made, and which prevents the State from performing it, is in violation of the contractual conditions which existed when such contract was entered into between the creditor of the State and the State.

The language of this Court is very apt in the case of

Hall v. *Wisconsin*, 103 U. S., 5.

where it was held that

> A contract between a State and a party whereby he is to perform certain duties for a specific period at a stipulated compensation, is within the protection of the Constitution; and on his executing it he is entitled to that compensation, though before the expiration of the period the State repealed the statute pursuant to which the contract was made.

In that case the appropriation had been made, and the decision turned partly upon the question whether the plaintiff in error was or was not a public officer, but the principle here contended for was maintained:

> "In a sound view of the subject it seems to us that the legal position of the plaintiff in error was not materially different from that of parties who, pursuant to law, enter into stipulations limited in point of time, with a State, for the erection, alteration or repair of public buildings, or to supply the officers or employés who occupy them with fuel, light, stationery and other things necessary for the public service. The same reasoning is applicable to the countless employés in the same way, under the National Government.
>
> It would be a novel and startling doctrine to all these classes of persons that the Government might discard them at pleasure, because their respective employments were public offices, and hence *without the protection of contract rights.*"
>
> See *Hall* v. *Wisconsin*, 103 U. S., 5, at p. 10.

It would be "startling," indeed, to quote the language of this Court, if it would be held that a State could, by an amendment to its constitution, absolutely prevent its Legislature from passing an appropriation to pay for materials received by it under a lawful contract and for which its credit as well as its honor and good faith had been pledged to pay. Now, how does such a case differ in principle from the case at bar, as far as the question of the absence of any proceeding by which the Legislature can be compelled to pass an appropriation is concerned? Not at all. The mere fact, therefore, that, in this case, the North Carolina Legislature cannot, by legal process, be compelled to pass a measure to appropriate money for the payment of plaintiff's bond, furnishes no reason why they should be forbidden absolutely to pass such measure. On the contrary, a constitutional amendment which attempts to so prohibit payment is repugnant to the Federal Constitution, and must be declared null and void.

(*B.*) The Constitution of a State is a "law" within the meaning of the constitutional prohibition of State laws impairing the obligation of contracts.

> "This constitution" * * * "shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."
>
> Constitution of the United States, Article 6.

See

Railroad Co. v. *McClure*, 10 Wallace, 511.
Railroad Co. v. *Rock*, 4 Wallace, 177.
Fisk v. *Jefferson Police Jury*, 116 U. S., 131.

(*C.*) It should be remarked that all that is desired from this Court in this case is a ruling as to the invalidity of the constitutional amendment under consideration, in conformity with the opinion of Mr. Justice Harlan on this very question, which has been before this Court once before, under somewhat different circumstances in the case of North Carolina *vs.* Temple, 134 U. S., 22.

In that case suit had been brought by one Temple in a Circuit Court of the United States against the State of North Carolina and William P. Roberts, State Auditor, to compel the said State and its officials, including the Auditor, to execute and carry into effect a certain statute of the State passed January 29, 1869, which provided for raising taxes to pay the interest on certain bonds of the State, known as "Special Tax Bonds of the State of North Carolina," issued under the provisions of said Act and held by the plaintiff and others. The bill of complaint set forth among other things that the plaintiff was the holder for value of a number of North Carolina State bonds, the coupons on which had not been paid, and that the State by means of various enactments, including the constitutional amendment in question in this case, had undertaken to impair the obligation of the contract to pay contained in these bonds and coupons.

The Court dismissed the complaint, on the ground that the United States courts had no jurisdiction of such an action, the State not having consented to allow itself to be sued in a Federal Court. This case, therefore, is not at all in point on the question of the suability of the State, since it is conceded that a State cannot be sued in a Federal Court, under the eleventh amendment to the Constitution of the United States. It is of importance, however, on the question of the validity of this amendment to the State Constitution. In the lower Court, the invalidity of the constitutional amendment seems to have been taken for granted, as the judges decreed

that the State was indebted to Temple for the amount of his coupons, and they were divided in opinion only on the question of the suability of the State in a Federal court. The United States Supreme Court did not in its opinion deciding the case, touch upon the question of the invalidity of the constitutional amendment, confining itself exclusively to the point of the suability of the State in a court of the United States. Mr. Justice Harlan, in his dissenting opinion, however, speaks as though it were taken for granted by all the Court that the legislation in question (including the constitutional amendment here under consideration) was void as impairing the obligation of contracts. See dissenting opinion of Justice Harlan, which says:

> " I dissent from so much of the judgment in this case as holds that this suit cannot be maintained against the auditor of the State of North Carolina. *The legislation of which complaint is here made impaired the obligation of the State's contract, and was therefore unconstitutional and void. It did not, in law, affect the existence or operation of the previous statutes out of which the contract in question arose.* So that the Court was at liberty to compel the officer of the State to perform the duties which the statutes, constituting the contract, imposed upon him. A suit against him for such a purpose is not, in my judgment, one against the State. It is a suit to compel the performance of ministerial duties, from the performance of which the State's officer was not, and could not be, relieved by unconstitutional and void legislative enactments."

If the Court will adhere to this opinion and declare the constitutional amendment void, then plaintiff's contentions will be entirely upheld, and all that will be necessary to be done will be to remand this case to the State Court with instructions to proceed without regard to the void constitutional amendment.

IV.

In this case the remedy furnished by the State against itself was incorporated into the State Constitution by the same constitutional convention that authorized the issue of plaintiff's bond. That being so, plaintiff's bond must be construed in connection with this constitutional provision, and such remedy must be held to be part of the contract embodied in the bond.

Any attempted amendment of the Constitution, therefore, which either directly or by inference takes away this remedy impairs the obligation of the contract.

The remedy against the State of North Carolina, expressed in Article 4, Section 9 of its Constitution, which gives power to the Supreme Court to take cognizance of claims against the State, was formulated and adopted at the same session of the same constitutional convention that formulated and adopted the authority to the State to issue the series of bonds, one of which is the subject matter of the action in the case at bar. This remedy had never formed part of any previous North Carolina State Constitution. Therefore, the evident intention was to increase the credit of the State by giving simultaneously with the issuance of its bonds a remedy against the State, and that remedy must be taken to be part of the contract entered into with its creditors at that time.

Suppose that the State of North Carolina, for the purpose of meeting its necessary operations of government, had created a loan of $5,000,000, and to induce subscriptions to this loan and to increase the credit of the State had, in the same law which authorized the issue of the loan, created (as it was bound) a special jurisdiction of the Supreme Court to entertain the claims of persons under these bonded issues, and had stipulated the form of the

remedy which should be applied against the State; and suppose that by a separate and subsequent act of the Legislature, after the bonds had been taken, upon the faith, in part, of the contract with the State, that the State would allow itself to be sued and prescribing the remedy which it permitted to run against itself, it had repealed that portion of the act which authorized suits to be commenced against the State; would this Court, then, if such a violation of the contract with a creditor had been perpetrated, have considered itself bound by the principles laid down and interpretation given in the cases of Railroad Co. *vs.* Tennessee, 101 U. S., 337, and Railroad Co. *vs.* Alabama, 101 U. S., 832?

It is one thing for the Court to say that the State, without reference to any special contract that it has entered into, may give a remedy, which theretofore may not have existed, as an act of grace on its part, or surrender of the sovereignty of the State, a sovereignty, by-the by, which is regarded with greater sanctity in the United States than anywhere else in the civilized world where constitutional government exists, since in England, France and Germany the fiscus may be sued for any demand against the State. But the case at bar presents quite another question. Assuming that the ultra doctrines of sovereignty are all correct and that this Court was right, which we are bound to assume, in the determination of the cases in 101 U. S., cited above, why cannot the State, if it can contractually barter away its right of sovereignty as to taxation (See *Humphrey* vs. *Pegues*, 16 Wallace, 244; *Pacific R. R. Co.* vs. *Maguire*, 20 Wallace, 36); and its right of sovereignty as to its police power (See *Slaughter House Cases*, 16 Wallace, 36), also barter away that which it does not hold in trust for the people, as it holds the taxing power and the police power, and which therefore can much more readily and much more rationally be made the subject of barter by the State, namely, the surrender of its own dignity not to be subject to suit

within its own limits on a contract duly made and on the faith of which its credit has been created? Surely the language of this Court in Murray *vs.* Charleston, above cited, wherein it says that when the State becomes a borrower it ceases to act as a sovereign, and comes down to the level of private individuals, and that it has no right to invoke its sovereignty in such case, applies more emphatically when it has actually said: We shall not invoke our sovereignty as against this class of creditors.

Now we come very near to that condition of things in this case. The people of the State when they adopted the constitutional amendment and acts passed by the Constitutional Convention in 1868, adopted the debt which was incurred to the plaintiff, and adopted at the same time the remedy which the State opened to its creditors, including the plaintiff, for the enforcement of that debt. And therefore, those enactments of the constitutional convention may reasonably be read together as interpreting the meaning and purpose of the people of the State of North Carolina in 1868, at the time when the debt was created. If this is done, then the remedy given by the State against itself must be considered as part of the contract embodied in plaintiff's bond, and it is equally protected from impairment by the Constitution of the United States. Even, therefore, if the State court had been correct in its construction of the Constitutional Amendment of 1880 as a withdrawal of jurisdiction from itself—which as before shown is not the case—it erred in not deciding that the withdrawal of the remedy in a case like the one at bar is prohibited by the Constitution of the United States, and that, therefore, the constitutional amendment even so interpreted is void and of no effect.

V.

The Supreme Court of the United States will construe for itself the provisions of a State constitutional or statutory enactment which is claimed to be in conflict with the Federal Constitution, and will not follow the decisions of the State courts on a question of such construction.

In this case the question before the Court is: Does the Constitutional Amendment of 1880 conflict with the Constitution of the United States? In its decision of this question the Supreme Court will not be influenced by the decisions of the North Carolina Court construing the amendment and defining its scope, but will interpret for itself this amendment and its effect.

See *McGahey* v. *Virginia*, 135 U. S., 662.

The statement that this Court will follow the State courts in the construction of a State constitution or statute is always restricted by the proviso that there must be no question in such construction of a conflict between such constitution or statute and the Constitution of the United States.

See *McGahey* v. *Virginia*, above cited.
See also *Delmas* v. *Insurance Co.*, 14 Wallace, 661, at pages 668-669,

in which latter case the State court was held to have erred in not declaring a provision of the State Constitution to be void as being in conflict with the Constitution of the United States.

> "This Court has always jealously asserted the right, when the question before it was the impairing of the obligation of a contract by State legislation, to ascertain for itself whether there was a contract to be impaired. If it were

not so, the constitutional provision could always be evaded by the State courts giving such construction to the contract, or such decisions concerning its validity, as to render the power of this Court of no avail in upholding it against unconstitutional State legislation."

Delmas v. *Insurance Co.*, 14 Wallace, 661.

It should be remarked further that this Court, in construing the constitutional amendment in question in this case, should remember that this amendment is an enactment derogatory of the rights of property, and hence is to be most strictly construed.

See *Potter's Dwarris on Statutes and Constitutions*, page 257, and cases cited.

VI.

The only question before the United States Supreme Court is whether the North Carolina Constitutional Amendment does or does not conflict with the Federal Constitution.

The answer in this case, as shown by the record, contained various defenses in addition to the defense setting up the validity of the constitutional amendment. The State court, however, never considered any of those other defenses, nor had they anything to do with its decision.

In the case of Baltzer & Taaks *v.* The State, which the Court cited as controlling, it said:

"Hence, without reference to the merits of the plaintiffs' claim in any aspect of it, this Court has not jurisdiction thereof."

104 N. C., 265, at p. 276.

This language shows conclusively that the action of the Court in granting the motion to dismiss was

caused wholly by a consideration of the effect of the constitutional amendment. It is, therefore, unnecessary for this Court to determine anything except the constitutionality under the Federal Constitution of the amendment to the Constitution of the State of North Carolina. This is sufficient to give it jurisdiction, inasmuch as it affirmatively appears that a Federal question was presented for decision to the State Court, and that the decision was based purely upon the determination of such Federal question, and upheld the validity of an enactment of the State claimed to be repugnant to the Constitution of the United States.

U. S. Revised Statutes, Sec. 709.
De Saussure v. *Gaillard*, 127 U. S., 216.
Eustis v. *Bolles*, 150 U. S., 361.

It is to be remembered that the question at issue here came before the State court not upon a trial of the case, but upon the argument of a motion to dismiss for lack of jurisdiction, for the purposes of which motion the facts as pleaded by plaintiff must be taken as true, and the bond in suit must be taken to have been originally validly issued, to be in the hands of a *bona fide* holder for value, and to constitute, therefore, a valid contract with the State; that the State court dismissed the case not upon the merits, as it expressly said, but because the constitutional amendment, in its view, made action on its part useless, and that in doing so it decided the said constitutional amendment to be not in conflict with the Constitution of the United States. Nor does the record disclose any other questions which, aside from the Federal one involved, would have been sufficient to make the judgment of the Court stand, inasmuch as that judgment was based, as before mentioned, purely upon the supposed effect of the amendment to the State Constitution.

VII.

The amount involved, or value of the matter in dispute, is not a jurisdictional fact in this case.

The appellate jurisdiction of the Supreme Court of the United States, in cases brought from the State courts arising under the Constitution, laws and treaties of the United States, is not limited by the value of the matter in dispute.

Buel v. *Van Ness*, 8 Wheaton, 312.

VIII.

The judgment of the Supreme Court of the State of North Carolina should be reversed, and the cause remanded to it, with instructions to treat the Constitutional Amendment of 1880 as void and of no effect, and to take further proceedings in this cause in accordance with law and in conformity with the decision of this Court declaring the nullity of the Constitutional Amendment in question.

Respectfully submitted,

SIMON STERNE,
Of Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
DEC 7 189
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

No. 52. October Term, 1895.

HERMANN R. BALTZER and WILLIAM G. TAAKS,
Plaintiffs in Error,

vs.

THE STATE OF NORTH CAROLINA,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

SIMON STERNE,
Counsel for Plaintiffs in Error.

The Evening Post Job Printing House, 156 Fulton St., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1895.

No. 52.

HERMANN R. BALTZER and WILLIAM G. TAAKS,
Plaintiffs in Error,

AGAINST

THE STATE OF NORTH CAROLINA,
Defendant in Error.

Brief for Plaintiffs in Error.

Statement.

This case brings up for review by this Court, by way of writ of error from this Court to the State Court, in part, the same question that was presented to it in the case of Hermann R. Baltzer, plaintiff in error, against the State of North Carolina, No. 93. The facts as they appear from the record are as follows:

By an act of the Legislature of the State of North Carolina, approved and ratified on the 15th day of August, 1868, it was provided as follows:

"AN ACT TO AMEND THE CHARTER OF THE CHATHAM RAILROAD COMPANY.

SECTION 1. The General Assembly of North Carolina do enact, That to enable the Chatham Railroad Company to finish their road, the Public Treasurer is hereby authorized and directed to deliver to the President of the said

Railroad Company, the coupon bonds of the State, of one thousand dollars ($1,000) each, to an amount not exceeding two million dollars ($2,000,000) signed by the Governor, countersigned by the Public Treasurer, and sealed with Great Seal of the State, bearing six per cent. interest, the principal payable at the end of thirty years from the date thereof, and the coupons of interest payable semi-annually in such form as the Public Treasurer may direct, principal and interest payable at such time and place as he may prescribe.

SEC. 2. Before the Public Treasurer shall deliver any of said bonds hereby authorized, the President of said Chatham Railroad Company shall deposit with the Public Treasurer the coupon bonds of the Company, signed by him and sealed with the Company's seal for the same amount, and bearing the same interest and date; the principal and coupons payable at the same time and place as those of the State hereinbefore directed to be issued and paid over to the said Company, and to secure the principal and interest of said bonds, issued by the Company, the State of North Carolina shall have, by this Act, a lien upon all the estate of the same, real or personal, which they may now have, or may hereafter acquire, between the point of intersection with Western Railroad, and the South Corolina State line, including that at both points, together with all the rights, franchises and powers thereunto belonging, or that may hereafter belong to said Company, in respect of that portion of their line, which lien shall be more effectually secured by a first mortgage duly executed by said Company to the State, and registered in the Register's office in the County of Wake and in the office of the Secretary of State, and in case of the failure of said Company to pay the semi annual interest on their bonds for twenty-four months after such interest shall become due, or to pay the principal of said bonds for twelve months after their maturity, the Board of Internal Improvements, for and in behalf of the State, may enter upon and take possession of all the property hereinbefore specified and dispose of the same by sale, so as to protect the State.

SEC. 3. The Chatham Railroad Company may at any time before maturity discharge the bonds of said Company deposited with the Public Treasurer, by substituting in lieu thereof coupon bonds of the State, or other indebtedness of the State, or payment in national currency.

SEC. 4. That any Railroad Company within this State shall be at liberty to take or purchase stock in, or lend money to, or purchase bonds of this or any other Railroad Company in this or any adjoining State.

SEC. 5. This Act shall be in force from and after its ratification.

Ratified the 15th day of August, A. D. 1868."

This act, as shown by the provisions thereof, was passed for the purpose of loaning the credit of the State of North Carolina to the Chatham Railroad Company, a corporation organized under the laws of that State. Pursuant to the provisions of the Act, and on or about the 21st day of September, 1868, the said Chatham Railroad Company executed and delivered under its corporate seal to the Public Treasurer of North Carolina first mortgage bonds of said company, aggregating $2,000,000 in amount; and also a first mortgage, as security for the same, executed in proper form and according to the terms of the said act. This mortgage was thereafter duly recorded and became a first lien upon the property covered by it and mentioned in the Act of August 15, 1868 (Record, pp. 20 and 21).

The intention with which these bonds and the mortgage securing the same were given by the Railroad Company to the State, was to substitute the State's higher credit for that of the Railroad Company by an exchange of bonds so that the public would more readily part with money and material and that the railway might more promptly be built, for the benefit of the State of North Carolina and its inhabitants. As shown by the terms of the Act of August 15, 1868, the State was to

and did receive for the State bonds issued by it a security equivalent to a first lien upon all the property and franchises of the Chatham Railroad Company, the transaction being substantially that the interest on the Railroad Company's bonds, and ultimately the principal, paid by the company, would put the State in funds to pay the interest on and principal of its bonds in the hands of their several holders. Practically, therefore, the security given by the Railroad Company to the State was for the benefit of the holders of the State bonds, and for them exclusively.

On or subsequently to the 19th day of October, 1868, the officials of the State of North Carolina duly executed 2,000 coupon bonds of the said State, numbered from 1201 to 3200, both inclusive, bearing date October 1, 1868, each for $1,000 and in the form prescribed by the provisions of the act, and thereupon delivered said bonds to the officers of the Chatham Railroad Company (Record, p. 21). The form of the said North Carolina State bonds is as follows (Record, p. 2):

"UNITED STATES OF AMERICA.

No.

It is hereby certified that the State of North Carolina justly owes to
or bearer, one thousand dollars, lawful money of the United States, at the National Bank of the Republic, in the City of New York, on the first day of October, 1898, with interest thereon at the rate of six per centum, payable half yearly at the said bank on the first days of April and October in each year from the date of this bond and until the principal be paid on surrendering the proper coupons hereto annexed.

In witness whereof the Governor of the said State, in virtue of power conferred by law, hath signed this bond and caused the great seal of the State to be hereto affixed, and her public treasurer hath countersigned the same at the seat of

government of the said State this first day of October, 1868.

W. W. HOLDEN,
Governor.

Countersigned,
D. A. JENKINS,
Public Treasurer.

$1,000.

Issued under an act to amend the charter of the Chatham Railroad Company, ratified August 15, 1868.

[SEAL.]

Interest coupons are thereunto attached and are, save for due-dates and numbers necessarily varying, of the following tenor:

> The State of North Carolina will pay to bearer, at the National Bank of the Republic, in the City of New York, on the first day of April, 1869, thirty dollars on bond ..... for $1,000.
>
> $30. D. A. JENKINS,
> Public Treasurer."

These bonds were known as "high-numbered" Chatham bonds to distinguish them from another issue.

The Railroad Company thereupon negotiated a certain number of said State bonds and the plaintiffs became the owners of 150 thereof, for value, having received the same in part payment for iron, of the value of $167,097.73 delivered by them for the purposes of said railroad (Record, p. 23.) For this iron the plaintiffs received the sum of $73,483.10 in cash and 150 of these "high-numbered" bonds of the par value of $1,000 each, which latter were given to them on account of the balance of $93,615.57 due them for the iron so furnished. Said balance of $93,615.57 was paid plaintiffs in the form of these 150 bonds, it being the intention that they should pay themselves out of the proceeds realized by them from the sale of said bonds, which, of course, were never at any time marketable at their par value or near that

value. The Railroad Company negotiated and sold for other purposes 152 more of these bonds, leaving in their hands 1698 of the 2,000 "high-numbered" bonds received from the State, which were never negotiated (Record, p. 24.) Shortly after the receipt of these bonds by plaintiffs, doubts were thrown upon the validity of the entire issue. Plaintiffs had negotiated a sale for the 150 bonds which they had received, at a price which would have paid the balance of $93,615.57 due them, but before the said sale could be closed and the bonds delivered, they were discredited by non-payment of interest and otherwise, and were withdrawn from the list of bonds listed as marketable at the Stock Exchange of New York City, and as a result, such sale was not completed and plaintiffs were left with the 150 bonds in their hands (Record, p. 23). Immediately afterwards the plaintiffs demanded of the contractor who was building the railroad for the Chatham Company, payment in cash of the balance of $93,615.57 due them for the iron which had been delivered, but the only reduction of this sum ever made was by the repurchase by the contractor of 10 of the 150 bonds for $6,150, still leaving a balance of $87,465.57 due plaintiffs, which has never been paid, and for which they still hold 140 of these "high-numbered" State bonds. No interest coupons attached to these 140 bonds have ever been paid (Record, p. 26). After the "high-numbered" bonds issued by the State were so discredited, the Railroad Company, desiring to secure the return of its 2,000 first mortgage bonds which it had deposited with the State as security, and the satisfaction of its mortgage, returned, pursuant to the provisions of the Act of August 15, 1868, to the State Treasurer, 1,703 of the 2,000 "high-numbered" State bonds which it had received. The Railroad Company was unable to return 297 of the 302 such bonds which had been negotiated, and desiring to obtain back all its 2,000 first mortgage bonds, the Railroad Company gave to the State, in addition to

the 1703 "high-numbered" State bonds returned by it, 297 other bonds of the State of North Carolina, as to which no suggestion of invalidity had been made. In return for the bonds so received, the State Treasurer surrendered all of the 2,000 first mortgage bonds of the Railroad Company, aggregating $2,000,000, held by the State. This was done in the year 1873. There were thus left outstanding after the year 1873, of the bonds authorized by the Act of August 15th, 1868, only the 297 bonds above mentioned, of which the plaintiffs hold 140, of the par value of $140,000 (Record, pp. 24–25), having become the owners of them in good faith and for value given.

The effect of all these transactions, therefore, was that the State, without having parted with any value whatever—it having received back all its own "high-numbered" bonds, except 297, which 297 it had made worthless on the market and discredited—was left with 297 other bonds, a valuable asset of the par of $297,000, in its possession. Meanwhile the plaintiffs hold 140 of the bonds which had been made worthless by the acts of the State, and which have been to them, therefore, a total loss. Under these circumstances, it is contended by plaintiffs that inasmuch as the mortgage given by the Railroad Company to the State and the Railroad Company's bonds, also so given, were given to the State to place it in funds to pay its own bonds of this issue in the hands of their different holders, and were consequently virtually a trust fund for such holders, that, therefore, when the State returned to the Railroad Company such trust fund, and received from the Railroad Company all of its own repudiated bonds, with the exception of 297 outstanding in the hands of *bona fide* holders, and in place of which 297 repudiated bonds it received 297 other State bonds, for which it had parted with no value whatever, such 297 other bonds became themselves a trust fund for the holders of the 297 repudiated bonds, in place of their proportionate part of the primary trust fund, consisting of the Railroad Com-

pany's bonds and the mortgage securing the same, which the State had surrendered to the Railroad Company.

For the purpose of obtaining their proportionate part of such trust fund, the plaintiffs in error herein brought an action in March, 1888, in the Supreme Court of North Carolina, in the nature of a suit in equity, asking that it be decreed either that their 140 "high-numbered" State bonds are valid obligation of the State of North Carolina, and that the State be ordered to pay them the amount of all the overdue coupons attached to those bonds, with interest, or that the State of North Carolina be adjudged to have received 140 of the 297 substituted bonds from the Railroad Company in trust for plaintiffs, and that the plaintiffs recover of the State the amount of all the overdue coupons attached to these 140 substituted bonds, with interest (Record, pp. 25 and 26). The theory of the action was, as above stated, that since the State had parted with no consideration and had received 297 good State bonds, it owed an equitable duty to these plaintiffs to apply a proper proportion of such 297 good State bonds to plaintiffs' benefit, in order to make up to them their loss on the 140 "high-numbered" State bonds claimed to be void and repudiated.

> The Supreme Court of North Carolina is by the Constitution of that State, made the court of primary jurisdiction in actions against the State:
>
> "Claims against the State. The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next Session of the General Assembly for its action" (Article 4, Sect. 9, Constitution of the State of North Carolina).

The defenses set up by the defendant to this action alleged the invalidity of the 140 bonds held by plaintiffs, and claimed that plaintiffs' rights, if any, were against the Railroad Company. The defendant also denied that the 297 bonds received by the State were valid bonds, set up the State Statute of Limitations, and alleged that plaintiffs' suit was in

the nature of a creditor's bill, and as such would not lie against the State (Record, pp. 32–35).

The action never came to trial. Upon the pleadings defendant's counsel made a preliminary motion to dismiss the cause for lack of jurisdiction on the part of the State Court, basing such motion upon an amendment to the Constitution of North Carolina adopted in 1880, which added to Section 6 of Article 1 thereof the following words:

> " Nor shall the General Assembly assume or pay or authorize the collection of any tax to pay, either directly or indirectly, express or implied, any debt or bond incurred or issued by authority of the Convention of the year 1868, nor any debt or bond incurred or issued by the Legislature of the year 1868, either at the special session of the year 1868, or at its regular sessions of the years 1868–'69, 1869–'70, except the bonds issued to fund the interest on the old debts of the State, unless the proposing to pay the same shall have first been submitted to the people and by them ratified by the vote of the majority of all the qualified voters of the State at a regular election held for that purpose."

This amendment was claimed by the plaintiffs to be repugnant to that clause of the Constitution of the United States which prohibits a State from passing any law impairing the obligation of contracts, and to be, therefore, totally null and void. The question of the validity of this Constitutional Amendment is discussed at length in the brief in the case argued together herewith, that of Baltzer *vs.* the State of North Carolina, No. 93, which presents that one question clean-cut to this Court.

Plaintiffs opposed the motion so made to dismiss this cause, on the ground that their cause of action was not a " debt or bond " within the terms of the said Constitutional Amendment, and that at any rate said amendment impaired the obligation of contracts, and was, therefore, in conflict with the

Constitution of the United States, and void. (See Record, page 42.)

Thereupon the action was dismissed by the Court in an opinion delivered by Judge Merrimon, which is set forth at length on pages 36-42 of the record. The Court held that plaintiffs' cause of action grew out of the issue of bonds by the Legislature of 1868; that the Constitutional Amendment of 1880 included in its scope every possible claim referring to the debts or bonds embraced in it, whether legal or equitable, expressed or implied, and that this constitutional amendment, therefore, barred the consideration of plaintiffs' claim, and deprived the Court of jurisdiction to take cognizance of the same. It also decided that said amendment was not repugnant to the Constitution of the United States and was valid (Record, p. 42). Its opinion and reasoning on this latter point is set forth at length on pages 3-5 of the statement of facts contained in the brief in case No. 93, argued together herewith.

The Court, in its decision, expressed no opinion as to whether the 297 unquestioned bonds were or were not received by the State in trust for the holders of the "high-numbered" bonds claimed to be void, notwithstanding the fact that for the purposes of a motion to dismiss for lack of jurisdiction, the facts pleaded by the plaintiffs should have been taken as true (see Record, bottom p. 39).

Plaintiffs contend that all the rulings of the State Court on these questions were erroneous and have resulted in great wrong to them. The questions so disposed of on the motion to dismiss now come before this Court by writ of error to the Supreme Court of the State of North Carolina for the purpose of securing the reversal of the latter Court's decision.

The assignments of error on which plaintiffs mainly rely are as follows (Record, pp. 14-16):

That the Supreme Court of the State of North Carolina allowed the defendant's motion to dismiss the complaint for lack of jurisdiction, and held and

decided that the portion of Section 6 of Article 1 of the Constitution of the State of North Carolina, added thereto by amendment adopted in 1880, was valid and constitutional.

That the State Court refused to hold that said amendment was repugnant to the Constitution of the United States, and was void, and that the decision of said Court was in favor of the validity of said amendment.

That the said Court decided that said void amendment barred plaintiffs' claim and deprived the Court of jurisdiction to consider the same.

That the State Court declined to allow a trial of the merits of plaintiffs' action, and upon allowing said preliminary motion to dismiss the complaint entered a judgment of dismissal of plaintiffs' said cause of action.

That the State Court did not, for the purposes of the motion to dismiss, take the facts pleaded by the plaintiffs to be true, and refused to decide that the State was under an obligation to apply to plaintiffs' benefit 140 of the 297 unquestioned bonds received by it from the Railroad Company.

POINTS.

I.

It was error for the State Supreme Court to hold that the amendment to the Constitution of the State of North Carolina adopted in 1880 was a valid enactment and did not conflict with the Constitution of the United States, and that plaintiffs' claim was barred by the constitutional amendment, and that such amendment deprived the court of jurisdiction to take cognizance of plaintiffs' cause of action. The Constitutional Amendment of 1880 is repugnant to the Constitution of the United States and null and void and should not have been considered by the State Court as of any validity or effect either upon plaintiffs' claim or its own jurisdiction.

In the argument of the motion to dismiss this cause, in the State court, some stress was laid on the point that plaintiffs' claim was not included in the scope of the Constitutional Amendment of 1880. The Supreme Court of North Carolina, however, decided to the contrary and held that such amendment was a valid enactment and barred plaintiffs' claim. Such decision of the State court was entirely erroneous, inasmuch as the Constitutional Amendment of 1880 is repugnant to that clause of the Constitution of the United States which forbids a State from passing any law impairing the obligation of contracts, and is, therefore, null and void. This has been shown at length in the brief in the case of Hermann R. Baltzer, plaintiff in error, against the State of North Carolina, No. 93, argued together herewith, which presents that one question to this Court Whether or not, therefore, plaintiffs' claim was within the scope of the Constitutional Amendment of 1880, that

amendment, being void, should have had no effect to deprive plaintiffs of the power to resort to the Supreme Court of the State of North Carolina for the consideration of their claim, and should have been entirely disregarded by the State court.

See cases and brief presented herewith in

Hermann R. Baltzer, Plaintiff in Error, *v. The State of North Carolina*, No. 93.

In addition to what has been said in the brief in case No. 93, thus referred to, counsel respectfully urges that if the constitutional amendment of 1880 has the effect of divesting the Supreme Court of the State of North Carolina of jurisdiction to give the plaintiffs such relief as lies in its power upon their implied contract arising from the substitution in 1873 of the 297 unquestioned bonds of the State for those which had originally been issued to the Railroad Company, and of which latter these plaintiffs hold 140, or if it impairs their right to look to the trust fund which has been created for their benefit by the transaction between the Railroad Company and the State in 1873—that is, the substitution of the 297 bonds for the security which the plaintiffs theretofore had—then this Constitutional Amendment of 1880 is as much obnoxious to, and prohibited by, Section 10 of Article 1 of the Constitution of the United States, forbidding any State to pass any law impairing the obligation of contracts, as it is violative of that provision of the Federal Constitution by its impairment of the original contract of 1868.

See Fisk *v.* Jefferson Police Jury, 116 U. S., 131, where it is said:

> "The vice of the argument of the Supreme Court of Louisiana is in limiting the protecting power of the constitutional provision against impairing the obligation of contracts to express contracts, to specific agreements; and in rejecting that much larger class in which one party

having delivered property, *paid money*, rendered services, or suffered loss at the request of or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation can no more be impaired by a law of the State than that arising on a promissory note."

II.

No other reason appears in the decision of the State Supreme Court why, aside from the question of the invalidity of the Constitutional Amendment of 1880, its judgment should stand. It was error for the State Court to refuse to hold that the 297 substituted State bonds received by the State from the railroad company were so received in trust for the *bona fide* holders of the 297 "high-numbered" State bonds that had been issued to the Chatham Railroad Co. The State by its issue of bonds which it afterwards repudiated having placed plaintiffs in the position of loss through its own acts and wrong, and having received a valuable consideration (the 297 unquestioned State bonds) without parting with anything whatever, owed to these plaintiffs an equitable duty to pay over to them a proportionate part of such 297 bonds or their value, and it was error for the State court to refuse to so find. The fund thus created is impressed with a trust in favor of the only persons who parted with the consideration which created such fund.

(*a.*) This case having never come to trial on the merits in the State court, but coming before it on a motion made upon the pleadings to dismiss the cause for lack of jurisdiction, all the facts pleaded in

the complaint should have been, for the purposes of such motion, and must be upon the argument of this writ of error, taken as true.

Whenever a person has obtained money or property to which in justice he is not entitled, and which equitably belongs to another who has suffered loss arising from the transaction between them, an equitable duty is owed by the person in possession of the fund to pay it over to the other.

This is a principle of equity jurisprudence which is too well settled to require any discussion. The method in which courts of equity have worked out the relation between the parties is by the medium of a constructive trust; that is, a trust arising without any intention on the part of the parties that it should be created, in fact, directly contrary to that intention, but presumed to exist by the law in order to do justice between the parties.

Pomeroy's Equity Jurisprudence, Vol. 1, p. 137; Vol. 2, p. 616.

Bispham's Principles of Equity, 4th Ed., p. 118.

> "By the well settled doctrines of equity a constructive trust arises whenever one party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it."
>
> *Pomeroy's Equity Jurisprudence*, Vol. 2, Sec. 1047.

This principle of equity applies equally to any property other than money.

This is exactly the principle on which plaintiffs' ground their claim. Their cause of action presents a most obvious case for the application of this doctrine. In the case at bar the State has received a valuable asset, consisting of 297 unquestioned bonds (by the receipt of which its treasury was so much the gainer, and their subsequent alleged destruction, therefore, if true, makes no difference), in return for which it has parted with nothing of any value what-

ever. This must be conceded for the purposes of this writ of error. It has repudiated its own 297 bonds issued to the Railway Company, and in part sold to plaintiffs for materials, and which are in the hands of these plaintiffs and of other *bona fide* holders, who have, therefore, suffered a loss due to the wrong or alleged transgression of authority on the part of the State, exactly equivalent to the profit which the State itself has made out of the transaction. Under these circumstances no court of equity should possibly refuse to hold that the State owes a duty to the holders of the repudiated bonds to make good to them out of the fund in its hands their loss arising from its own wrong.

The largest class of cases that has arisen in which the principle here relied upon has been applied, is where the law has enforced a return of the consideration received for contracts which have been disavowed or declared void. Let us take the parallel case of a contract *ultra vires* of a corporation, and which, therefore, cannot be enforced.

> "To say that a corporation cannot sue or be sued upon its *ultra vires* contract is one thing; to say that it may retain the proceeds thereof which have come into its possession, without making any compensation whatever to the person from whom it has obtained them, is something very different, and savors very much of an inducement to fraud."
>
> *Green's Bryce's Ultra Vires*, 2d Ed., p. 721.

And again:

> "But though a corporation cannot be sued, any more than any other citizen directly upon a contract or analogous transaction which does not bind it, yet if it sets up this defense, it must restore to the other party what it has obtained from him. It may repudiate the transaction, if it chooses, but if so it must repudiate altogether; it cannot reprobate and approbate; it cannot reject and yet keep what in another form it has rejected."
>
> *Id.*, page 717.

Yet this is substantially what is attempted by the defendant in the case at bar. Here are 297 bonds in the hands of the State representing $297,000 of its unquestioned indebtedness, which are practically the consideration for the issue of the "high-numbered" bonds, of which plaintiffs hold 140 in good faith and for value. If these 297 bonds are not such consideration, then it is difficult to see on what possible theory or ground, or for what purpose, the State of North Carolina received them. Now the State disavows the 297 "high-numbered" bonds for which the 297 other bonds were the consideration. Even on the assumption, which is not admitted, that the bonds of plaintiffs were invalid, does not its attempt to withhold such consideration from those who practically advanced it, that is, the holders for value of the "high-numbered" bonds, "savor much of an inducement to fraud"?

> "It is admitted that the contract of a corporation which it has no legal capacity to make cannot in its terms be enforced, but does it follow that the alleged transgressor may appropriate without compensation the money, the goods or the services of the person with whom it deals? There are no doubt authorities upon the general question which cannot be reconciled, but it is safe to say that such a rule as this has never been established."
>
> *Tracy* vs. *Talmage*, 14 N. Y., at p. 217.

> "Indeed, few, as it seems to me, will be found to deny either the justice or policy of the rule which refuses to permit the guilty party to retain the fruits of an illegal transaction at the expense of the more innocent."
>
> See *Tracy* vs. *Talmage*, 14 N. Y., at pp. 190–1.

The cases of contracts made by infants and afterwards disaffirmed by them are also in point. There it has always been held that the consideration for the disaffirmed contract must be returned.

Kitchen vs. *Lee*, 11 Paige, 108.

Henry vs. *Root*, 33 N. Y., at p. 553.

In such cases, indeed, there might be some justification for allowing the infant to retain in his hands the consideration of his disaffirmed contract, in order that persons who, against the policy of the law, persisted in dealing with infants, might be punished for such disobedience. And yet the Courts have refused to uphold any such doctrine, but have insisted upon a return of the consideration for the disaffirmed contract. With how much more force, therefore, should they insist upon the return of the consideration for the discredited contract entered into by the State of North Carolina with the holders of its "high-numbered" bonds, who have taken such bonds in good faith and for value and relying upon the credit and honor of the State, and have practically parted with the very consideration which the State now attempts to withhold from them?

There is a series of decisions by the New York State Court of Appeals which determine a question very similar to the one involved in this case. These are the so-called Town Bond cases. In these cases taxes had been collected by the Town Commissioners to pay certain town bonds which had been issued to aid railroad companies and had been exchanged for stock of such companies. It was determined that the bonds so issued were void, but it was held, nevertheless, that inasmuch as the taxes had been voluntarily paid and would not be returned, they were a fund in the hands of the Town Commissioners, to which the holders of the void bonds were entitled.

See *People ex rel. Martin* vs. *Brown*, 55 N. Y., 180.

The Court said:

> "The defendant cannot claim to retain the money as the representative of the taxpayers. There is no relation of principal and agent, or trustee or *cestui que trust*, existing between the taxpayers and the collector, and it does not appear but that it was paid by them voluntarily,

> and under circumstances which would prevent their recovering it back from any one. The town has received, and still holds, the stock of the railroad company taken in exchange for the bonds, *and the right of the bondholders to have the money applied to pay the interest on the bonds is much better certainly than any which the defendant can assert to retain it.*"

See also

> First National Bank *vs.* Wheeler, 72 N. Y., 201,

where the Court said:

> "It is conceded that the defendants have the fund in their hands, and that it was raised and received for the express purpose of paying coupons held by the plaintiff and others, but the Commissioners in turn contest the right of the plaintiff to recover on the ground that they owed no duty to the plaintiff, for the reason that the bonds were invalid, and consequently the plaintiff had no debt against the town or right to the money in their hands. I am of opinion that this is not a defense to this action."

Followed in seven other cases (see 72 N. Y., 601), and this, in spite of the fact that it was conceded that the holders of the bonds could not have recovered on the bonds themselves because they were void.

The State in this case is attempting to do exactly what the Commissioners did on behalf of the towns in the New York cases. It both disaffirms its contract and desires to retain in its possession the consideration for the contract disaffirmed. This equity will not permit it to do. Suppose that the State, in direct violation of one of its constitutional provisions, had undertaken to issue $1,000,000 in notes which were to circulate as money, issuable to persons who deposited with the State gold bars equivalent in value to the money thus to be issued by the State; that the question was subsequently raised whether these issues

of paper were lawful issues, and the one million dollars of notes issued in that way had been declared by the courts to be unlawful issues and not money nor binding obligations of the State. Can it be that the courts of any of the civilized commonwealths of the United States would allow the State to make a profit of the one million dollars deposited against the currency so issued? Would not the Courts instantly say that although the issue is illegal and not a binding obligation of the State, the State is nevertheless trustee, for the holders of these notes, of the gold bars deposited against their issue, that the holders of the notes for value are equitable assignees of the security so deposited, and that the State would not be permitted to make a one million dollar profit by reason of its own transgression of the limit of its authority, and the citizens who trusted the faith of the State put to a corresponding loss? There can be no doubt but that such would be the ruling of any court of equity. Yet practically that, is what the defendant in this case has undertaken to do, and that without any judicial authority whatever declaring invalid the bonds issued to the Chatham Railroad Company, and which plaintiffs hold. The technical doctrines as to whether a sovereign State can or cannot be a trustee are entirely irrelevant, since this is a question of a general equitable principle applying to all persons, corporations and States included. As a matter of fact, however, it is well settled that a State may sustain the character of a trustee.

See

Lewin on Trusts, Vol. 1, p. 30.
Perry on Trusts, Vol. 1, Sec. 41.
McDonogh's Executors vs. *Murdoch*, 15 How. (U. S.), 367.
Bank of Charlotte vs. *Jenkins*, 64 N. C., 720.
Hill on Trustees, p. 50.
Shoemaker vs. *Grant Co.*, 36 Ind., 175.

The case of

Florida Central R. R. Co. vs. *Schutte*, 103 U. S., 118,

is decisive of the point here in controversy. In that case it was held that the mortgage given by the railroad company to the State of Florida to secure its equivalent bonds given to the State, in return for the bonds issued by the State and in the hands of *bona fide* holders, was security for the payment of the obligations of the State, and therefore, although those obligations were held to be unconstitutional and void, the railroad company's mortgage was nevertheless decreed to be subject to the claims of the State bondholders. In other words, if in this case the State still had in its possession the railroad company's bonds and the mortgage securing the same, such bonds and mortgage would be held, under the Schutte case above cited, to be a trust fund for the benefit of the holders of the discredited State bonds. Now in this case there has been merely a substitution of security, and the 297 substituted unquestioned State bonds are just as much a trust fund for the holders of the 297 discredited "high-numbered" bonds as the Railroad Company bonds and the mortgage securing the same were a trust fund for such holders before. The 297 unquestioned State bonds were given to the State with no other end in view than that with which the Railroad Company's own bonds, for which they were substituted, had been given to it previously. If, therefore, the Railroad Company's bonds and the mortgage securing such bonds were a trust fund for the benefit of the holders of the "high-numbered" State bonds, and that was decided affirmatively by the Schutte case, then the substituted 297 unquestioned State bonds were just as much such trust fund for such holders. That being the case, the State rests under an equitable and legal obligation to apply to plaintiffs' benefit such proportion of such trust fund as they are entitled to by reason of their ownership of the 140 "high-numbered" bonds which have been

sought to be repudiated. It is immaterial for the purposes of this argument whether the 297 "high-numbered" State bonds are or are not actually binding obligations of the State. The fact is that it is claimed by the State that it transgressed the limit of its authority in issuing these "high-numbered" bonds. In the face of such claim and the consequent refusal and omission of the State to pay any interest on such "high-numbered" bonds, its attempt to retain in its possession the consideration for their issue, that is, the 297 unquestioned State bonds, which it received from the Railroad Company, is an attempt to profit by its own wrong, a transaction which no court of equity will countenance or permit.

The authority of the Schutte case has never been questioned, and cases perhaps at first sight inconsistent with it, as a matter of fact uphold the principles it decided. In the case of

Tompkins vs. *Little Rock, &c., R. R.*,
125 U. S., 109,

it was held that the particular statute of the State of Arkansas under consideration, authorizing the issue of bonds in favor of the railroad company, did not create a lien in favor of the State on the railroad company's property, to secure the State for the payment of its bonds; and that of course, that being so, no lien existed in favor of the holders of the State bonds which had been subsequently declared unconstitutional and void. The Court said:

> "We agree with counsel for the appellants that if on an examination of the statutes, read in the light of the circumstances which surrounded the Legislature at the time of their enactment, it appeared to have been the intention to charge the road of the company as a road with a liability for the repayment of the loan to be made, it would be the duty of a court of equity to do everything in its power which was necessary to enfore that charge. And it may also be true that the courts ought to construe the statutes liberally with a view to the establishment

> of such a charge as against the company itself, or those claiming under it, because if the charge was actually created by the statutes, those dealing with the company were bound to take notice of it; but after a careful consideration of the statutes, and construing them liberally in favor of the State, we have been unable to find that any such intention did, in fact, exist. There was a plain and simple way in which such a lien could be created, and that was by providing in express terms for it. That way had been adopted by the State in a statute passed March 18, 1867, and it was the way usually adopted by other States when granting similar aid to their own companies. The wide departure which Arkansas made in this statute from the accustomed form of proceeding, both at home and elsewhere, is strongly indicative of an intention to waive security any further than it was embraced in the reserved power of sequestration."

In other words, when the statutory lien exists, as it existed in unmistakable terms in this case, courts of equity will construe it liberally, and do all in their power to give it effect.

In the so-called Tennessee bond cases, reported in 114 U. S., 663, the State by its statute had created a statutory lien in its own favor on the property of certain railroad companies to secure it for bonds issued by it to aid such companies. The State afterwards discharged the lien on these railroad companies' properties, they having taken the steps which the statute prescribed to entitle them to procure such discharge. The bonds issued by the State to aid the companies were afterwards repudiated, and it was sought by certain bondholders to enforce for their benefit the former lien on the railroad company properties which the statute had created for the benefit of the State. It was held that this could not be done; that in the first place the lien, if any, that had been created by the State statute was purely for the benefit of the State, and did not inure to the benefit of the State bondholders, and that the

railroad property, when the claim of "implied" lien was made after it had passed into the hands of third parties, *bona fide* purchasers for value, was freed from any claim of such equitable lien.

It is to be remembered, however, that in this case every one of the "high-numbered" bonds showed upon its face that it was issued under a certain statute, to wit, the statute of August 15, 1868, and that that statute in terms provided for, and consequently pointed out to the bondholders the actual and stipulated lien and security which the State had taken from the Railroad Company to enable it to pay its own debts, and the bondholders had a right to and undoubtedly did rely on such security. The construction, therefore, of the particular statute in the Tennessee cases is not at all in point as qualifying the scope of the decision in the Schutte case, or as throwing any light upon the interpretation of the statute in the case at bar. It is to be remembered, further, that in the Tennessee cases the railroad companies had actually done their duty and discharged their obligations to the State, and had lawfully, and in accordance with the terms of the statutes, secured a discharge of the lien which the State formerly had upon their property. In the words of the Court (114 U. S., p. 663):

> "The State, in the exercise of its legislative discretion, has released each of the companies whose property is involved in these suits from all its obligations growing out of the original loans, and has canceled the liens created for their security. The companies have either voluntarily paid their debts to the satisfaction of the State, or the State has foreclosed the lien which was reserved, and sold the property free of that encumbrance, either to the present defendants or to those under whom they claim."

It is difficult to see, therefore, on what possible theory companies that had actually discharged their obligations, as far as they were concerned, could be

held liable to the holders of the State bonds, and made to pay their debt twice over. It is not claimed that in this case the railroad company should be made liable for the plaintiffs' claim, nor have the plaintiffs any right to have recourse to such company, inasmuch as it has actually provided a fund for the payment of that claim, and has been lawfully discharged by the State from all its obligations in the premises. What is claimed is that the State should be held bound to apply properly the fund thus created, and neither the equitable nor legal obligation of the State so to do can be successfully disputed.

It was claimed by the State in its answer (Record, pp. 33–34) that the consideration for the issue of the State's "high-numbered" bonds was the Railroad Company's bonds deposited with it. But that is a mere begging of the question, inasmuch as the plaintiffs in error and others advanced the real consideration for such "high-numbered" bonds (the plaintiffs having advanced the larger part of $167,000 worth of iron), and are, therefore, entitled to its return or to the return of its equivalent. The State claimed also that the rights of plaintiffs, if any, were against the Railroad Company on that company's own bonds and mortgage, and that plaintiffs had already attempted to enforce such rights against the Railroad Company, but had failed. The answer to this is (1), that such a defense does not lie in the mouth of a wrongdoer who is attempting to profit by his own wrong as against the parties to whom that wrong has caused loss; (2) that the Railroad Company, as a matter of fact, performed its duty in the premises, and did all that could be expected of it when it provided a fund (the 297 substituted bonds) for the payment of all the outstanding "high-numbered" bonds issued for the company's accommodation; (3) that the suit against the Railroad Company, to which the defendant refers in its answer (Record, p. 35), involved a question entirely irrelevant to the present contro-

versy. There it was sought to charge the company as an undisclosed principal on a contract made by these plaintiffs with an alleged agent, and the Court merely decided that a case had not been made out showing the Railroad Company to be such principal. This, and this only, was the point decided in that case; and it is difficult, indeed, to see how that throws any light at all upon the equities of the plaintiffs in the case at bar. See *Baltzer* v. *Railroad Company*, 115 U. S., 634, in which case, it should be remarked, the fact did not appear on the record, as it does now, that the sale which plaintiffs had negotiated for their bonds had fallen through, and that plaintiffs therefore remained the owners of the one hundred and forty bonds, which they now hold.

Courts of equity have, for the purpose of applying the principle that no one shall be permitted to profit by his own wrong, even gone so far as to absolutely disregard statutory enactments, as in the case of

Riggs vs. *Palmer*, 115 N. Y., 506,

where it was held that

> "All laws, as well as all contracts, may be controlled in their operation and effect by these general fundamental maxims of the common law, viz.: No one shall be permitted to profit by his own fraud, to take advantage of his own wrong, to found any claim upon his own inequity, or to acquire property by his own crime."

In that case a beneficiary under a will, in order that he might prevent the revocation of a provision in his favor, and to obtain the speedy enjoyment and possession of the property, willfully murdered the testator. It was held that such beneficiary, by reason of the crime committed by him, was deprived of any interest in the estate left by his victim, and so, was not entitled to the property, either as donee under the will, or as heir or next of kin, and that the provisions of the

will in his favor were canceled, that decision being based upon the general maxim of law above.

In this case the State has been guilty of no crime or offense comparable to that under consideration in the Riggs *vs.* Palmer case. It has, however, by its transgression of authority, which it itself asserts, made these plaintiffs and others who took the State's "high-numbered" bonds in good faith, and for value, suffer grievous loss. The State, therefore, having had placed in its hands a fund which grew out of the issue of these "high-numbered" bonds and their exact equivalent, with which to make such loss good, should no more be permitted to make a profit out of this loss, and by its own wrong, than was Palmer in the case above mentioned.

(*b.*) The decision of the Supreme Court of North Carolina contained one statement which, though it should have had no place at all in the decision of a motion to dismiss for lack of jurisdiction, and, therefore, really requires no answer, is so clearly contrary to all doctrines of equity and to the sense of fair dealing that it should be separately noticed. It is as follows:

> "While the State, through its constituted authorities, soon after their issue, regarded and treated the bonds issued to the Chatham Railroad Company as invalid, it was apprehended, not unreasonably, that they might be purchased innocently in some instances in the course of business at some price, and in other instances by mere speculators in the markets, who would insist upon their validity and payment, and that the State would be greatly annoyed and harassed in a variety of ways, putting it to great trouble and expense to defend itself against such unfounded claims. In view of this state of things, the valid bonds were so received not for the purpose of paying directly or indirectly the invalid ones, but to indemnify the State against costs and expenditures incurred in resisting them."
>
> Record, p. 40, also p. 15.

In other words, there is here asserted the doctrine that the 297 substituted bonds were given to the State, not for the purpose of creating a fund to meet the "high-numbered" bonds negotiated, but to indemnify the State for expenses to be incurred by it in defending claims made on such negotiated "high-numbered" bonds,—the entire equivalent of such bonds, not to pay just claims arising from their issue, but to pay the costs of suits brought upon such claims. Why not pay the claims themselves then, rather than spend the whole amount in litigation to defeat their payment? The contention of the State Court needs but to be stated, in order that its repugnance to sound law may be made evident. The purpose for which the 297 substituted bonds were given to the State is as clear as though it had been published in unmistakable terms by the parties to the transaction, and at any rate that purpose should never have been questioned by the State Court in deciding a motion to dismiss on the pleadings, where all the allegations of plaintiffs should have been assumed to be true.

(*c.*) The "high-numbered" bonds issued by the State of North Carolina were issued solely for the purpose of loaning the State's credit to the Chatham Railroad Company. That is shown by the terms of the act authorizing the issue of these bonds. Such bonds were, therefore, as far as the State was concerned, accommodation bonds, performing a function similar to that of accommodation bills in the domain of commercial paper. In other words, the State, the principal debtor on the bonds, is substantially, as in the case of such bills, a mere surety, it substituting its own better credit for that of the Railway Company in order to facilitate the construction of the Railway.

> "'Accommodation bill' means a bill whereof the acceptor (*i. e.*, the principal debtor on the instrument) is substantially a mere surety for some person who may or may not be a party thereto."
>
> *Benjamin's Chalmers on Bills, Notes & Checks*, p. 105.

In this view, the legal relation of the State to the holders of the "high-numbered" bonds might be defined to be that of surety for the performance of the Railroad Company's contract contained in that company's bonds, performance of which would enable the State to pay its own direct obligations. The State, therefore, standing in the relation of surety to the holders of its own bonds, the ordinary legal consequences that flow from the surety relation must result to it.

It is well settled that a creditor may have recourse, for the payment of his debt, to all collateral securities deposited by the principal debtor with a surety, for the indemnity of such surety. Here the Railroad Company being from this standpoint the principal debtor, and the State the surety, or standing in the situation of a surety, the holders of the bonds issued to the Railroad Company have the right to resort to the indemnity fund, that is, the 297 bonds (substituted for the original indemnity fund consisting of the Railroad Company's bonds and mortgage) deposited by the principal debtor with the State, standing in the situation of surety, for the State's indemnity.

In the case of

Vail vs. *Foster*, 4 N. Y., 312,

a purchaser of land procured a third person to give his note for part of the consideration money, and to indemnify such maker of the note executed to him his bond and mortgage on the premises. Before the note became due the maker failed; it was held that the vendor of the land was entitled to the benefit of the bond and mortgage, and had superior equities to a judgment creditor of the maker of the note. The facts of this case are so similar to those of the case at bar, that they should be stated at greater length. In the words of Bronson, Chief Judge, writing the opinion:

"The case is shortly this. The plaintiffs sold land to Morgan, who, instead of giving his bond and mortgage to the plaintiffs to secure the purchase money, got Flagler to give his note to the plaintiffs for the amount, payable in one year; and Morgan gave a bond and mortgage to Flagler for his indemnity, for the same amount, and payable at the same time with the note. Before the credit expired Flagler became insolvent; and the plaintiffs seek relief, either on the ground of an equitable lien on the land for the purchase money, *or by reaching the mortgage to Flagler, and having it foreclosed for the payment of the debt.*"

The Court said:

"It is a well settled rule in equity that the creditor shall have the benefit of any *counter bonds* or collateral securities which the principal debtor has given to the surety, *or person standing in the situation of a surety,* for his indemnity. Such securities are regarded as trusts for the better security of the debt, and chancery will compel the execution of the trusts for the benefit of the creditor (Maure *vs.* Harrison, 1 Eq. Cas., Ab., 93, K. 5; Curtis *vs.* Tyler, 9 Paige, 432; Wright *vs.* Morley, 11 Ves., 22; Bank of Auburn *vs.* Throop, 18 John., 505; 4 Kent, 307, 6th Ed.; 1 Story's Eq., Secs. 502, 638). This principle covers the case, and the plaintiffs are entitled to the mortgage which Morgan, the principal debtor, gave to Flagler, the surety, for his indemnity."

In that case Morgan occupied exactly the same position as the Railroad Company in the case at bar; Flagler, the maker of the note, the position of the State, the issuer of the "high-numbered" bonds; the vendors of the property, the position of plaintiffs, the holders of the "high-numbered" bonds. If the vendors of the property in the Vail *vs.* Foster case had a right to resort to the bond and mortgage which Morgan gave to Flagler to indemify him for the payment of his note to the

vendors, then equally have the plaintiffs in error in this case the right to resort to the two hundred and ninety-seven substituted State bonds which the railroad company gave to the State for *its* indemnity. Morgan was not the principal debtor on the note to the vendors any more than is the Railroad Company the principal debtor to the plaintiffs in error on the "high numbered" bonds; nor was Flagler any more of a surety than the State is in this case, since Flagler was the principal debtor on his own note. The facts are very similar and the case consequently upholds the principle stated above. (Cited as authority in Wager *v.* Link, 134 N. Y., at p. 126.)

See also

Moses v. *Murgatroyd*, 1 Johns. Ch., 119.

Sheldon on Subrogation, Sect. 163.

Hand v. *Savannah, &c., R. R. Co.*, 12 S. Car., 314.

Barnes v. *Mott*, 64 N. Y., 397.

Whether, therefore, we take the State to occupy the position of principal debtor on its "high-numbered" bonds, or of a party who stands in the relation of surety to the plaintiffs in error, in either view the 297 substituted State bonds are legally and equitably subject to the plaintiffs' claim, and are a trust fund for the payment of such claim. The State is consequently under an obligation to apply to plaintiffs' benefit their proportionate part of such trust fund, and it was error for the State Court to refuse to decide that the plaintiffs in error are entitled to such proportionate part of the 297 bonds in question. We have shown, therefore, that the equities of the case are decidedly on the side of plaintiffs, although for the purposes of the motion made in the State Court to dismiss for lack of jurisdiction, the question of such equities was not properly involved at all. They have been discussed here at length only in order that it may appear beyond question that even aside from the

subject of the constitutional amendment of 1880, there is absolutely no reason why the judgment of the State Court should stand. In this connection, it should be remembered that the Supreme Court of North Carolina has itself said:

> "Hence, without reference to the merits of the plaintiffs' claim, in any aspect of it, this Court has not jurisdiction thereof" (Record, p. 42),

basing that conclusion upon the void Constitutional Amendment of 1880.

And again:

> "We think we ought to add that if the facts as they appear strongly in the pleadings are indeed such, the plaintiffs' claim as against some party is one of real merit. They supplied the iron now on the railroad of the company mentioned, and it seems they have been paid but a small part of the large sum of money it cost them. We do not mean to intimate that the State is liable, legally or otherwise, for their debt, but surely some party ought to pay it."
>
> Record, page 42.

III.

There being no other reason apparent, either in the record or in the decision of the State Supreme Court, why the judgment of that Court should be upheld, and the record clearly showing that a Federal question was presented for determination to the State Court, that the judgment of such State Court could not have been given without deciding such Federal question, and the ruling of the State Court on said Federal question being claimed to be error, this is sufficient to give the United States Supreme Court jurisdiction.

United States Rev. Stat. Sec. 709.
De Saussure vs. *Gaillard*, 127 U. S., 216.
Eustis vs. *Bolles*, 150 U. S., 361.

IV.

The judgment of the Supreme Court of the State of North Carolina should be reversed, and the case remanded to it with instructions to treat the constitutional amendment of the State of North Carolina, of 1880, as void and of no effect, and to take further proceedings in this cause in accordance with law and in conformity with the decision of this Court.

Respectfully submitted,

SIMON STERNE,
Of Counsel for Plaintiffs in Error.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1895.

No. 93.

HERMANN R. BALTZER,

Plaintiff in Error,

vs.

THE STATE OF NORTH CAROLINA,

Defendant in Error.

No. 52.

HERMANN R. BALTZER AND WILLIAM G. TAAKS,

Plaintiffs in Error,

vs.

THE STATE OF NORTH CAROLINA,

Defendant in Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR, ON POINT OF JURISDICTION. FILED BY LEAVE OF COURT.

SIMON STERNE,

Counsel for Plaintiffs in Error.

The Evening Post Job Printing House, New York.

Supreme Court of the United States.

October Term, 1895.

HERMANN R. BALTZER, Plaintiff in Error, AGAINST THE STATE OF NORTH CAROLINA, Defendant in Error.	No. 93.
HERMANN R. BALTZER and WILLIAM G. TAAKS, Plaintiffs in Error, AGAINST THE STATE OF NORTH CAROLINA, Defendant in Error.	No. 52.

SUPPLEMENTAL BRIEF FOR THE PLAINTIFFS IN ERROR, ON THE POINT OF JURISDICTION.—FILED BY LEAVE OF COURT.

Statement.

A question has arisen in these cases—raised by one of the Justices on the argument—as to the jurisdiction of the United States Supreme Court to review, by writ of error, any act or proceeding of the

Supreme Court of the State of North Carolina, done or taken by the latter Court in the exercise of the jurisdiction given it by the North Carolina State Constitution, in Article 4, Section 9 thereof, reading as follows:

> "CLAIMS AGAINST THE STATE.—The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action."

It is questioned whether under this provision of the Constitution of North Carolina, the Supreme Court of that State, when it entertains the trial of claims against the State, is acting as a court, or performing any judicial functions at all, or is anything more than an auditing board, without any power in it to enforce the decisions at which it has arrived; and it is, therefore, doubted whether from the judgment or decisions of such a tribunal of a State an appeal lies to the United States Supreme Court by way of writ of error. As bearing upon the question raised, the case of *Re* Sanborn, 148 U. S., 222, has been mentioned. In that case it was attempted to appeal to the Supreme Court of the United States from a decision rendered by the Court of Claims on a claim which had been referred by consent to that Court by the head of one of the executive departments of the Government. The Supreme Court decided that, inasmuch as the Court of Claims in that case could only report its findings of fact back to the executive department which had referred the case to it, the Court of Claims was, in so far as that case was concerned, practically acting as a board of audit, and was not performing any judicial functions; so that, under the Constitution of the United States, an appeal from its decision therein would not lie to the United States Supreme Court. The decision in *Re* San-

born was based altogether upon the decision of this Court in the case of Gordon *v.* United States, 69 U. S., 561, the decision in which latter case was arrived at as the result of the opinions expressed by Chief Justice Taney, being his last judicial utterance, and reported in the appendix to Volume 117 of the U. S. Reports, at pages 697–706.

That the cases *Re* Sanborn and Gordon *v.* United States have no application to the case at bar, and that this Court has undoubted jurisdiction to review by writ of error the action of the Supreme Court of North Carolina herein, and has, in similar cases to this, uniformly assumed jurisdiction and determined the questions raised before it on their merits, we shall now proceed to show.

The jurisdiction of this Court to review by writ of error the decisions or judgments of State Courts is given by Section 709 of the Revised Statutes, which is substantially in the same language as Section 25 of the Judiciary Act of 1789. Section 709 U. S. Revised Statutes provides as follows:

> "SEC. 709. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judg-

ment or decree complained of had been rendered or passed in a court of the United States (and the proceeding upon the reversal shall be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to the court from which it was so removed.)

The Supreme Court may (reaffirm) reverse, modify or affirm the judgment or decree of such State Court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ."

I.

The jurisdiction of the United States Supreme Court to review by writ of error the decision of a State court in a case in which a federal question is involved, is entirely distinct from its appellate jurisdiction to review the decisions of the inferior federal courts established by Congress under the Constitution, such as the Circuit and District Courts of the United States.

The cases of Re Sanborn, 148 *U. S.*, 222, *and Gordon* vs. *U. S.*, 69 *U. S.*, 561, *are cases arising under the jurisdiction of the Supreme Court in appeals from inferior federal courts, and form no precedent for, nor have they any application to, the case at bar.*

In the case of Gordon *vs.* U. S., 69 U. S., 561, the only question considered was that of the constitutional jurisdiction of the Supreme Court to hear and decide appeals from the Court of Claims. The appeal was taken under the act of March 3, 1863, entitled:

> "An Act to amend an act to establish a court for the investigation of claims against the United States."

The fifth section of the act provided for appeals to the Supreme Court of the United States from a final judgment of the Court of Claims in certain cases.

The seventh section of the act provided that in all cases of final judgment by the Court of Claims, or upon appeal by the Supreme Court, where the same should be affirmed in favor of the claimant, the sum due thereby should be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment duly authenticated.

Section 14 provided that no money should be paid out of the Treasury for any claim passed upon by the Court of Claims until after an appropriation therefor had been estimated for by the Secretary of the Treasury.

Mr. Chief Justice Taney's opinion in this case, reported in the appendix to Vol. 117 U. S. Reports, says:

> "It will be seen by the sections above quoted that the claimant whose claim has been allowed by the Court of Claims, or upon appeal by the Supreme Court, is to be paid out of any general appropriation made by law for the payment and satisfaction of private claims, but no payment of any such claim is to be made until the claim allowed has been estimated for by the Secretary of the Treasury, and Congress, upon such estimate, shall make an appropriation for its payment. Neither the Court of Claims nor the Supreme Court can do anything more than certify their opinion to the Secretary of the Treasury, and it depends upon him, in the first place, to decide whether he will include it in his estimates of private claims, and if he should decide in favor of the claimant it will then rest with Congress to determine whether they will or will not make an appropriation for its payment. * * * The third article of the Constitution, Section 1, provides that 'the judicial power of the United States shall be

> vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish,' and the last clause of the same article, after giving this Court original jurisdiction in the cases therein specified, provides that in all other cases 'the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.' * * * The appellate power and jurisdiction are subject to such exceptions and regulations as the Congress shall make. But the appeal is given only from such inferior courts as Congress may ordain and establish to carry into effect the judicial power specifically granted to the United States. The inferior court, therefore, from which the appeal is taken must be a judicial tribunal authorized to render a judgment which will bind the rights of the parties litigating before it unless appealed from, and upon which the appropriate process of execution may be issued by the Court to carry it into effect. And Congress cannot extend the appellate power of this Court beyond the limits prescribed by the Constitution, and can neither confer nor impose on it the authority or duty of hearing and determining an appeal from a Commissioner or Auditor, or any other tribunal exercising only special powers under an act of Congress. * * * It is very clear that this Court has no appellate power over these special tribunals, and cannot, under the Constitution, take jurisdiction of any decision upon appeal unless it was made by an inferior court exercising independently the judicial power granted to the United States. It is only from such judicial decision that appellate power is given to the Supreme Court."

It will be seen upon a reading of Chief Justice Taney's opinion that he speaks throughout of appeals taken from one of the inferior courts *established by Congress*, and all that that case decides is that such an appeal will lie to the Supreme Court of the United States only from the inferior federal court

when the latter court is exercising a "judicial" function.

The decision *in re* Sanborn, 148 U. S., 222, was to the same effect. That case arose after the Act of 1863, under which Gordon *vs.* United States had been decided, was so amended by statute passed in 1866, that a judgment of the Court of Claims was no longer subject to the discretionery power of the Secretary of the Treasury, in the sense that before it could be paid he would have to estimate the appropriation necessary for it, but the sum found to be due by such judgment was thereafter made payable "out of any general appropriation made by law for the payment and satisfaction of private claims."

And since such amendment

> "No doubt has been entertained that the Supreme Court can exercise jurisdiction on appeal from final judgments of the Court of Claims. United States *vs.* Alire, 73 U. S., 573." *
>
> *Re* Sanborn, 148 U. S., at page 225.

The Sanborn case, however, as already explained above, arose out of the referring of a claim by the Department of the Interior to the Court of Claims, and was not a case originally prosecuted in that Court. The Supreme Court therefore held, that inasmuch as all that the Court of Claims could do was to report its findings back to the Department, the reasoning of the decision in Gordon *vs.* U. S., applied in spite of the amendment to the Act of 1863, and that, therefore, no appeal to the Supreme Court could be taken.

Both Gordon *vs.* U. S., and *Re* Sanborn, therefore, were cases dealing exclusively with the ques-

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* We shall show hereafter that even under the amended act the Court of Claims has no real power to actually enforce its judgment, nor can the United States Supreme Court do so on appeal, and yet appeals to the United States Supreme Court are taken and that Court entertains jurisdiction thereof.

tion of the appellate jurisdiction of the Supreme Court over inferior federal courts.

But the power and duty of the Supreme Court to review by writ of error the decisions of a State court in cases involving a federal question, form an entirely different branch of its jurisdiction. By Section 2 of Article 3 of the Constitution, the judicial power of the United States is made to extend to all cases in law or equity arising under the Federal Constitution and laws. The case at bar is undoubtedly a case of such a nature, and in it the State court of last resort has directly decided that an enactment of the State claimed to be in conflict with the Constitution of the United States is not repugnant to the same, and is valid. Here, then, is one of the very cases in which the United States Supreme Court has jurisdiction, and inasmuch as the Supreme Court of North Carolina is in no way the creature of Congress and does not come under the head of one of the inferior tribunals created by Congress, the remarks of Chief Justice Taney and the case of *Re* Sanborn cannot be applicable to the case at bar, and are not in point.

If this were not true, and if it were possible for a State—by simply so technically limiting the jurisdiction of its highest Court that it would seem to be subject to the intervention of the State Legislature—to cut off all right of appeal from its Courts to the United States Supreme Court in cases involving a federal question, then any State might nullify the federal constitution at will and without danger of interference or check. This cannot have been intended. The Constitution of the United States contemplated that the sole ultimate power of determining the validity or invalidity of any State statute, if challenged, under the federal constitution, should rest in the Supreme Court of the United States, and of that jurisdiction this Court should not allow itself to be deprived by any act of a State in subjecting the*

* And this might evidently be done in all cases—both those between purely private parties, as well as those in which the State itself is a party.

jurisdiction of its highest Court to technical limitations.

For the purpose of determining, therefore, whether this Court has jurisdiction to review by writ of error the action of the Supreme Court of the State of North Carolina in this case, it is necessary to inquire only whether we are within the terms of Section 25 of the Judiciary Act, and of Section 709 of the United States Revised Statutes, and whether the judgment of the North Carolina Supreme Court was such a "final judgment in a suit in the highest court of law or equity of a State in which a decision in the suit could be had" as is contemplated by the sections of the Statutes and Judiciary Act referred to.

II.

The judgment of the Supreme Court of the State of North Carolina in the case at bar, finally dismissing plaintiff's action with costs, was a final judgment of the highest court of law and equity of that State in a suit before it, and unless reversed by the Supreme Court of the United States makes this case res judicata forever, and may in any subsequent proceedings be so pleaded. Such decision and judgment of the State Court is, therefore, reviewable by the Supreme Court of the United States.

(*A.*) In the first place it was a *final judgment.*

There can be no question but that a judgment which finally disposes of the litigation between the parties and ends forever their particular controversy in the court in which it was rendered, and which would in subsequent litigations for the same cause between the same parties be pleadable in bar as *res judicata*, is, both in general and within the terms of the Judiciary Act, a "final judgment." This is so well settled by numerous cases that it is usually stated

in the form of an established proposition by standard text writers as well as by judicial decisions.

Every definite sentence or decision by which the merits of a case or of a particular question of law or fact are determined, although it is not technically a judgment or although the proceedings are not capable of being technically enrolled so as to constitute what is technically called a record, is a judgment within the meaning of the law.

Commissioners of Tippecanoe County *vs.* Lucas, 93 U. S., 108.
Holmes *vs.* Jennison, 14 Peters, 540.
Freeman on Judgments, Vol. 1, p. 18.

And the words "decision" and "judgment" are used synonymously both in the Judiciary Act and in Section 709 of the Revised Statutes. Hence the fact that Section 4, of Article 9, of the North Carolina Constitution speaks simply of a "decision" cannot make any difference, especially since a judgment in the regular and usual form has actually been rendered (Record, Case No. 93, p. 16; Case No. 52, p. 42).

The judgment or decree need not finally determine the rights of the parties litigant. It is sufficient if it ends the particular suit in which it is entered.

Weston *vs.* City of Charleston, 2 Peters, 449.
Holmes *vs.* Jennison, 14 Peters, 540.
Freeman on Judgments, Vol. 1, p. 18.

If no further action of the Court is required to dispose of the cause it is final.

Van Fleet on Former Adjudication, Vol. 1, p. 125.

That judgment is final which terminates the litigation between the parties on the merits of the case, so that if there should be an affirmance in the Supreme Court the Court below would have nothing to do but execute the judgment it has already rendered.

Bostwick *vs.* Brinckerhoff, 106 U. S., 3.
Grant *vs.* Phœnix Mut. Life Ins. Co., 106 U. S., 429.

St. Louis, I. M. & S. R. R. Co. *vs.* Southern Exp. Co., 108 U. S., 24.
Ex parte Norton, 108 U. S., 237.
Mower *vs.* Fletcher, 114 U. S., 127.
Dainese *vs.* Kendall, 119 U. S., 53.

These cases are strongly in point. If the Supreme Court of the United States affirms the judgment of the Supreme Court of the State of North Carolina, nothing will remain to be done except to enter that judgment of affirmance* and collect (by execution, if necessary) the costs against plaintiffs by the State Court's judgment ordered to be paid (Record, Case No. 93, pp. 16, 17; Case No. 52, pp. 42, 43).

The plaintiffs in error are, therefore, entirely within the ruling of the cases above cited, and under those cases the judgments of the Supreme Court of North Carolina herein rendered must be held to be final judgments.

It would certainly not be denied that the judgment of the Supreme Court of the State is, so far as that State is concerned, and unless interfered with by this Court, a final one, and forever bars a new consideration of plaintiffs' case. As between the State and these plaintiffs in error no litigation could ever again be begun for the same cause. It is *res judicata*, and that is the test by which to determine the finality of a judgment, and must be the one contemplated by the Judiciary Act.

> "The word 'final' must be understood in the section under consideration as applying to all judgments and decrees which determine the particular cause."
>
> Weston *vs.* City of Charleston, 2 Peters, 449; opinion by Chief Justice Marshall.

> "If, by any direction, the entire cause is, in fact, determined, the decision, when reduced to form and entered in the records of the

* Of course, if the judgment is reversed and a proper trial is ordered, that is quite another question.

> Court, constitutes a final judgment, subject in a proper case to our review, whatever may be its designation."
>
> Commissioners of Tippecanoe County *vs.* Lucas, 93 U. S., 108.

> "A matter or question either of law or fact is *res judicata*, or set at rest, as to adverse parties and their respective privies, if it was a material issue in the proceeding, directly involved, and not merely accidentally cognizable, nor collaterally in question, and was adjudicated after a contest by a final judgment on the merits. In such case it cannot be again contested by the same parties or their respective privies in any other judicial proceeding."
>
> Van Fleet on Former Adjudication, Vol. I., p. 2.

It must certainly be conceded that under the authorities quoted the judgment of the North Carolina Supreme Court makes plaintiffs' claim within that State *res judicata*, and is, therefore, a final judgment.

And it is immaterial, for the purpose of determining its finality, whether the judgment was rendered in the exercise of original or appellate jurisdiction.

Hartman vs. *Greenhow*, 102 U. S., 672.

It must be borne in mind, too, that the writ of error here is to the court of last resort of the State of North Carolina, and seeks to bring up for review a decision against the plaintiffs in error, and that that decision is given effect in an absolute judgment of dismissal of plaintiffs' complaint, which is final and conclusive as between the litigants unless reversed by this Court, and, being a decision rendered in a case in which such plaintiffs claim protection from that very result by reason of the provisions of the Constitution of the United States, is, therefore, if erroneous, a decision against the protection that the Federal Constitution affords them against this final judgment. However defective

or incomplete the remedy in plaintiffs' favor might have been, the judgment against them was absolute —mulcting them in costs for which an execution lies against them—so that whilst ultimately they might not have obtained all the relief that would have been possible in a litigation against any other party than the State, the adverse decision from which they now appeal meets, in its terms, its form and its conditions every requirement of the Judiciary Act, upon the basis of which a writ of error lies. It was the "final judgment of the highest court of law or equity in the State in which a decision in the suit could be had" (U. S. R. S., Sec. 709).

> A judgment of a State court unconditionally dismissing the complaint, when nothing more is requisite to complete the dismissal, is a final judgment, and may be reviewed by writ of error.
>
> *Commissioners of Tippecanoe County* vs. *Lucas*, 93 U. S., 108.
>
> *New Orleans, &c., R. R. Co.* vs. *Morgan*, 10 Wall., 256.

(*B.*) This was a judgment in a "*suit*" within the terms of the Judiciary Act.

Any proceeding in a court of justice by which an individual pursues that remedy which the law affords him is a suit.

Weston vs. *Charleston*, 2 Peters, 449,

in which case Chief Justice Marshall said:

> "The term (suit) is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of a court is sought is a suit."
>
> See also *Aldrich* vs. *Ætna Ins. Co.*, 8 Wall., 491.

Both from a consideration of the provisions of the Constitution and of the statutes of the State of North Carolina, it must be evident that the proceeding which that Constitution created for the trial and determination of claims against the State is, in every sense of the word, a "suit," and is so regarded throughout the State itself. Thus the North Carolina Code provides, in detail, for the steps and proceedings that are to be taken in such a suit. Sections 947 and 948 of that Code are as follows:

> § 947. "The supreme court shall have original jurisdiction to hear claims against the state, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the general assembly for its action." (This is a recital of Article 4, Section 9, of the State Constitution).
>
> § 948. "Any person having any claim against the state may file his complaint in the office of the clerk of the supreme court, setting forth the nature and grounds of his claim. He shall cause a copy of his complaint to be served on the governor, and therein request him to appear on behalf of the state and answer his claim. The copy shall be served at least twenty days before application for relief shall be made to the court. In case of an appearance for the state by the governor, or any other authorized officer, the pleadings and trial shall be conducted in such manner as the court shall direct. If an issue of fact shall be joined on the pleadings, the court shall transfer it to the superior court of some convenient county for trial by a jury, as other issues of fact are directed to be tried, and the judge of the court before whom the trial is had shall certify to the supreme court, at its next term, the verdict and the case, if any, made up and settled as prescribed in cases of appeal to the supreme court. If the state shall not appear in the action by any authorized officer, the court may make up issues and send them for trial, as aforesaid. The supreme court shall in all cases report the facts found, and their recommendation thereon, with the

reasons thereof, to the general assembly at its next term."

This provides a complete method for the trial of questions, both of fact and law, in every way similar to the method of trial provided in cases between purely private parties. When there is any question of fact to be tried and the Supreme Court sends such issues to a jury, before a Judge of the Superior Court, it may review such findings on appeal, and if there was no error it accepts the verdict of the jury on the facts as final.

See *Clements* vs. *The State*, 77 N. C., 142.

In three other States of the Union remedies by suit against the State for the enforcement of claims are given, practically similar to that existing in the State of North Carolina. These States are Mississippi, Nebraska and California.

See

Annotated Code of Mississippi, Secs. 4248-4250.

Compiled Statutes of Nebraska, 1889, p. 800

Supplement to Codes, California, 1893, Secs. 379, pp. 944 and 945.

And in all these States such remedies are looked upon as similar to the ordinary suits in a court of justice, although execution may not issue against the State and an appropriation by the Legislature to pay the sum found due by the Court's judgment may be necessary.

Without doubt, therefore, the case at bar was a "suit."

(*C.*) *The Supreme Court of the State of North Carolina is, both in the exercise of its general jurisdiction and in the exercise of its jurisdiction to adjudicate claims against the State, given by Article* 4,

Section 9, of the North Carolina State Constitution, the highest court of law and equity of the State in which a decision in the suit could be had, and to it, as such, a writ of error from this Court will lie.

This brings us to the main objection which seems to have been raised in this case, it being asserted that in the exercise of its special jurisdiction to adjudicate claims against the State and submit its judgments and decisions thereon to the State Legislature, the Supreme Court of North Carolina was not really a court at all, and was not such a "highest court of the State" as could render a "final" judgment. Yet it is difficult to see how this objection could possibly be insisted upon, or how the status of that Court, which is conceded to be the highest Court of the State, as the record shows, is changed by the particular provisions of the State Constitution referring to the trial of claims against the State. There was no other court in North Carolina in which the plaintiffs could have brought their suits—no other court had jurisdiction. On the other hand, the State Supreme Court had both original and final jurisdiction of the plaintiffs' suits, and its decision of such suits, so far as the State and the plaintiffs were concerned, finally determined the same, since it was the absolute trial of the rights of the parties, judgment against the claimants barring the claims while judgment in their favor would have conclusively established their validity.

The fact that thereafter the plaintiffs' remedy on the adjudication of their rights, which has been had, may not be an absolutely complete one. has nothing to do with the nature of the tribunal, the trial of the claim, or the finality of the judgment after such trial rendered. There are various ways in which the remedy of a judgment creditor upon a judgment that he has obtained are sometimes limited, and if such limiting of remedies were held to determine the finality or incompleteness of the judgment, then this Court would have to refuse

to entertain jurisdiction of many cases which it has unhesitatingly considered and determined.

But, it is maintained, the State Supreme Court is not for the purposes of this special jurisdiction a court at all—is a mere auditing board with no power to enforce its decisions or judgments, and for that reason no writ of error from the Federal Supreme Court to review its decisions will lie. Is this true? Does the mere fact that the State Court cannot, in such cases, absolutely enforce its decision and judgment by awarding execution against State funds, constitute such a derogation of its position as the highest court of law and equity of the State of North Carolina that it no longer occupies that position, and that this Court will no longer review its decisions *pro tanto* by writ of error? This Court has adopted no such test, and has in many instances reviewed the determinations and decisions of inferior tribunals, with no more power to enforce their judgments than the Supreme Court of North Carolina when trying claims against the State.

(1.) In the case of

Olney v. *Arnold*, 3 Dallas, 308,

decided by the Supreme Court of the United States in 1796, a question was raised very similar to the one here under consideration. That was a writ of error from this Court to the Superior Court of Judicature for the State of Rhode Island, which Court, it seems, under the provisions of the statutes of that State, was the highest court of law of the State in which a decision in such a suit as had been brought could be had. Under the State statutes, however, a petition might be presented to the General Assembly of Rhode Island which would in a proper case entirely set aside and annul the judgment of the Court Counsel for the defendant in error therein therefore

argued that the Superior Court of Rhode Island could not be the highest Court of the State in which a decision in the suit could be had. His argument on this point as partly reproduced in the report of the case was as follows:

> "The Act of Congress provides that the removal of a cause from a State court in the specified cases should only be 'from a final judgment or decree in any suit in the highest court of law or equity of a State *in which a decision in the suit could be had.*' Now Olney might, by petition, have obtained from the General Assembly a construction on the act of Congress, which he pleaded in bar to the action brought against him." * * * "Suppose, indeed, that the judgment were to be affirmed here, Olney might still petition the Legislature and obtain a reversal and new trial; unless it can be maintained that the decision of this Court will work a repeal of the law of *Rhode Island*."

The Court, however, decided that the Superior Court of Rhode Island, on whose judgment the writ of error had been brought, was the highest court of law of that State "within the meaning of the 25th Section of the Judicial Act." This case, decided by this Court just one hundred years ago, is practically decisive of the point here raised.

(2.) In the cases of

> *Railroad Company* v. *Tennessee*, 101 U. S., 337;
> *Railroad Company* v. *Alabama*, 101 U. S., 832,

this Court assumed jurisdiction on writs of error to State courts, which it expressly decided were, as far as the trial of claims against States were concerned, "little else than auditing boards," and proceeded to consider and dispose of the questions decided by those State courts. These cases have been

cited in the principal briefs herein for the purpose of distinguishing them on the merits from the cases at bar, but of the question now raised, jurisdiction of this Court, they ar inasmuch as this Court there took without making any question as to its ri at all, seemingly having no doubt whate point. It considered the Federal quest had been raised in the State court, and, finding no error in that Court's decision, proceeded to affirm the judgment of a tribunal which it expressly decided was in that special case nothing but "a mere auditing board."

And Chief Justice Waite, in denying a petition for a rehearing, said—

> "The case is precisely like that of a judgment in the Court of Claims against the United States. By the Constitution of the United States 'no money shall be drawn from the treasury, but in consequence of appropriations made by law.' Art. 1, Sec. 9. Hence the party who gets a judgment must wait until Congress makes an appropriation before his money can be had."

See

Railroad Company v. *Alabama*, 101 U. S., 832.

(3.) This Court, as already stated herein, continually hears appeals from the judgments of the Court of Claims, although that Court—and therefore this one on affirmance—has no more power to enforce its judgment than the Supreme Court of North Carolina in adjudging that State to be indebted. Both judgments are dependent for their enforcement upon an appropriation by legislative bodies. When the Supreme Court at first refused to entertain appeals from the Court of Claims it did so—in spite of the fact that the right to appeal was expressly given by statute, such a statute being

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cited in the principal briefs herein for the purpose of distinguishing them on the merits from the cases at bar, but of the question now raised, as to the jurisdiction of this Court, they are decisive, inasmuch as this Court there took jurisdiction without making any question as to its right to do so at all, seemingly having no doubt whatever on that point. It considered the Federal questions which had been raised in the State court, and, finding no error in that Court's decision, proceeded to affirm the judgment of a tribunal which it expressly decided was in that special case nothing but "a mere auditing board."

in favor of the plaintiff in error,

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declared nugatory under the Constitution—because the judgment of such Court was subject to the discretionary power of the Secretary of the Treasury as to whether he would include it in his estimates for an appropriation, as well as to the will of Congress, as to whether that body would appropriate money for its payment. The power of the Secretary of the Treasury was taken away by an amendment passed by statute in 1866; but the power of Congress to refuse to appropriate funds still remains and can never be taken away. When, therefore, this Court decides that there is no doubt at all of its present jurisdiction on appeals from judgments of the Court of Claims,

U. S. v. *Jones*, 119 U. S., 477,

it settles as well its right to take jurisdiction by writ of error to the Supreme Court of North Carolina in the cases at bar.

It must be remembered that a sovereign power, even when it submits itself to suits in its own tribunals, will never submit to an execution. And this applies to the separate States of the Union as well as to the United States itself. In fact, it has been extended even to the agencies of the State governments, such as county and municipal corporations, the property of which, held for public purposes, is not subject to execution.

Meriwether v. *Garrett*, 102 U. S., 472.
Dillon's Municipal Corporation, Sec. 576.
Freeman on Executions, Secs. 22 and 126.
Beach on Public Corporations, Sec. 1653.
Brinckerhoff *v.* Board of Education, 2 Daly (N. Y.), 443,

in which last cited case it is said: "These (public structures) * * * cannot be seized to satisfy a judgment, as these structures are public property, devotod to specific public uses, in the same sense as

similar structures are, in use by the State government, and though this is a distinction which appears to have been taken for the first time it is one that commends itself as founded in public necessity."

If, therefore, the issuance of an execution were to be made in every instance an essential incident of a judgment of a court of last resort of a State, in order to bring up such judgment for review by this Court, where a Federal statute or the Federal Constitution is invoked, then a large class of cases—particularly those in which the temptation to render a decision against the superior force of an act of Congress or of the United States Constitution is much stronger than in cases between individuals, because a State is involved and all presumptions in any way in favor of the State would be given effect—will be entirely and irreparably withdrawn from cognizance by the general judicial power of the Union, which should, in fact, decide them. The words "its decision shall be merely recommendatory," in Section 9 of Article 4 of the North Carolina Constitution, are merely words of supererogation. They are unnecessary and useless words in the Constitution. Suppose that the Constitution had simply said "the Supreme Court shall render a decision." Even then execution could not have issued. The decision of the Court would have been final--just as it is final as far as the judicial proceeding is concerned now—but it would still have required an appropriation by the Legislature in order practically to carry it into effect, and such appropriation by legislative action is in every State and in the United States voluntary, and cannot be controlled by a judicial tribunal.

As a matter of fact, too, a judgment against a State without execution is, in most cases, if not in all, far more valuable than a judgment with execution against a private party. Execution is not given against a State, not because the State will not pay--since indeed it is legally a presumption that a State *will and does* pay its debts—but simply because

public convenience and, in a way, the public safety demand that the treasury of a sovereign power be not subject to compulsory process at the instance of a private individual. Therefore, the statement in the Constitution of North Carolina, that the Court's decision shall be merely recommendatory, does not weaken the decision that otherwise could have been rendered. It is merely a statement of the legal effect of any decision against the State, and of the recognized principle of public law that executions do not issue against a sovereignty. That being so, no such presumption as to the valueless character of a judgment against such a government should arise as would be reasonable in a suit between private parties. If the exemption from execution, or from further process were as to private individuals, it might be said that the judgment is a non-justiciable one, and, therefore, not such a final judgment as the United States Supreme Court will review by writ of error; but in the case of a government—of a sovereignty—the judgment which might have been rendered in this case is justiciable as far as it is ever permitted to be by a sovereign community. This is a distinction which this Court must recognize, and does now recognize in the case of appeals from judgments of the Court of Claims, as we have already shown.

(4.) It should be remarked, further, that if this Court would only take jurisdiction in cases where its judgment can be enforced by process, then it could scarcely, if ever, exercise the original jurisdiction conferred upon it by the Constitution in suits between States, or where a State is a party. Yet it has always done so, and does so continually.

Indiana v. *Kentucky*, 136, U. S., 479.
United States v. *North Carolina*, 136 U. S., 211.
United States v. *Texas*, 143 U. S., 621.

In *United States* v. *North Carolina*, above cited, the United States brought an action of debt in this Court against the State of North Carolina, upon 147 bonds of that State, and partly to recover interest claimed to have run against these bonds after they became payable. Judgment on the merits was given for the defendant State; if, however, judgment against the State had been given, how could that judgment have been enforced? Certainly not by execution. There is no power in the judicial branch of the Government to enforce the Court's decision against a State. That could only be done by the aid of the executive power, an absolutely independent branch of the Government, and which might, or might not, enforce the judgment of this Court as it chose. In other words, such judgment would be purely "recommendatory."

In actions between States referring to boundaries there is also no method of enforcing the decision of the Court. In *Indiana* v. *Kentucky*, above cited, the Court ordered as follows:

> "Judgment will be entered in conformity with this opinion and Commissioners will be appointed to ascertain and run the boundary line as herein designated."

Can such a judgment be enforced by the judicial power of the Government?

In *United States* vs. *Texas*, above cited, it was held that the Supreme Court of the United States had original jurisdiction of an action by the United States against a State to determine a disputed boundary between a territory of the United States and that State. Here again there is no possible judicial process by which the judgment of this Court can be enforced.

Section 2 of Article III. of the Constitution of the United States further gives to the United States Supreme Court jurisdiction of actions "between a State or the citizens thereof and foreign States, citizens or subjects." This section of

the Constitution, therefore, contemplates the possibility of a judgment being rendered by this Court against a foreign State. Is such a judgment a justiciable one, or is there any possible way in which it can be enforced? Clearly not.

Evidently, then, the reason for giving the Supreme Court jurisdiction in such a case was that it was conclusively presumed that the effect of a judgment would be payment by the judgment debtor, a presumption which must equally apply to one of the sovereign States of our Union. And consequently the inference against the completeness of the judgment, which might be a reasonable one in the case of a judgment without execution affecting purely private parties, cannot apply to a case in which the judgment debtor is a sovereign commonwealth, that is presumed to, and generally does, pay its debts.

From the instances thus given in which this Court, both in the exercise of its original and of its appellate jurisdiction, unhesitatingly renders and reviews judgments which cannot actually be enforced by judicial process, it is evident that full jurisdiction exists upon its part to consider this case by writ of error to the Supreme Court of North Carolina. And although, as we have already stated, that question is not properly involved here at all, inasmuch as this is an appeal from judgments *against* the plaintiffs dismissing their complaint, and not in their favor, yet even considering it on the same basis as if it had been a judgment against the State, this Court has undoubted jurisdiction.

If it refuses so to hold and rules these plaintiffs in error out of court, it not only finally deprives them of that right to a hearing on the question erroneously decided by the Supreme Court of North Carolina and against the provisions of the Constitution of the United States, which is guaranteed them by that Constitution, but it practically lays down the broad doctrine

that a State can free itself from the limitations imposed upon it by the Federal Constitution by simply so abridging the jurisdiction of its highest court as to cut off the right to appeal to the Supreme Court of the United States. The prohibition against States enacting statutes in conflict with the Constitution would be destroyed, and the enacting of such statutes could proceed without interference or hindrance from the paramount law of the land.

Respectfully submitted,

SIMON STERNE,
Of Counsel for Plaintiffs in Error.

Office Supreme Court U. S.
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CLERK.

No. 93.

Supreme Court of the United States,

OCTOBER TERM, 1895.

HERMANN R. BALTZER,
Plaintiff in Error,

v.

THE STATE OF NORTH CAROLINA,
Defendant in Error.

BRIEF

OF

F. I. OSBORNE,
Attorney General of North Carolina,
JAMES E. SHEPHERD,
CHARLES M. BUSBEE,
Counsel for Defendant in Error.

No. 93.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

HERMANN R. BALTZER, Plaintiff in Error,

v.

THE STATE OF NORTH CAROLINA, Defendant in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

This proceeding against the State of North Carolina was commenced in the Supreme Court of that State under Section 9, Article 4, of its Constitution, which reads as follows:

"The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall report to the next session of the General Assembly for its action."

The claim of the plaintiff in error is based upon certain interest coupons (amounting in the aggregate to $1,320.00, and payable on various dates, from April, 1869, to the 1st of October, 1890. These coupons are attached to a bond of 1,000, executed by W. W. Holden, Governor, and purporting to be issued in pursuance of an Act of the General Assembly of the State of North Carolina, entitled "An Act to amend the charter of the Chatham Railroad Company," ratified March 11, 1868."

The complaint, after stating that the said coupons had been duly presented for payment, and that payment had

been refused, further alleged that the amendment to Section 6, Article I, of the Constitution (adopted by a vote of the people at a general election in November, 1880), was "repugnant to the Constitution of the United States, is void, and is no restriction upon the power of the Legislature to pay the amount of the coupons alleged herein to be due to this plaintiff.

The said amendment reads as follows: "Nor shall the General Assembly assume or pay, or authorize the collection of any tax to pay, either directly or indirectly, expressed or implied, any debt or bond, incurred, or issued, by authority of the Convention of the year one thousand eight hundred and sixty-eight, nor any debt or bond, incurred or issued by the Legislature of the year one thousand eight hundred and sixty-eight, either at its special session of the year one thousand eight hundred and sixty-eight, or at its regular sessions of the years one thousand eight hundred and sixty-eight and one thousand eight hundred and sixty-nine, and one thousand eight hundred and seventy, except bonds issued to fund the interest on the old debt of the State, unless the proposing to pay the same shall have first been submitted to the people, and by them ratified by the vote of a majority of all the qualified voters of the State at a regular election held for that purpose."

The defendant in its answer, among other defenses, denied the validity of the said bonds and coupons, and alleged that the same were void, because they were issued without any lawful authority, and that the plaintiff was affected with notice of such invalidity. The defendant denied the allegation that the amendment, referred to in the complaint, was repugnant to the Constitution of the United States; and the defendant, in general terms, also moved to dismiss the proceeding, because the Supreme Court of North Carolina had no jurisdiction thereof. This motion was allowed, and this decision, relating purely to the jurisdiction, and to that alone, is the only ruling made by the said Court in this proceeding.

ARGUMENT.

I.

This is an attempt on the part of the plaintiff in error to obtain a decision of this Court as to the validity of the State Constitutional Amendment in respect to its prohibition upon the Legislature to levy taxes to pay any portion of a certain class of State bonds, which embraces the claim of the plaintiff without a vote of the people. No such question was decided by the State Supreme Court. It simply decided that its recommendatory jurisdiction, as to such claims, had been taken away.

It is apparent, from a cursory glance of the record, that the only question decided by the State Court was that the Constitutional Amendment had deprived it of any recommendatory jurisdiction as to claims of this character. The Court did not undertake to pass upon the validity of said amendment, in respect to the question now sought to be raised, and the interjection of that question into this case by the allegation that said amendment is repugnant to the contract clause of the Federal Constitution, very plainly indicates that the plaintiff is endeavoring to obtain by *indirection* the decision of this Court upon an important question, belonging entirely to the political department of the State government, and which was not decided nor necessary to be decided in this proceeding by the Supreme Court of North Carolina. The Court decided that it had no jurisdiction to pass upon the plaintiff's claim, thus leaving open any point as to the validity of the Constitutional Amendment as affecting the supposed obligation on the part of the State to pay such claims, and its inhibition upon the political department of the government to make appropriation for such purpose.

In *Beers* v. *Arkansas*, 20 How., 527, a case similar to the

present, where this court sustained the validity of a law repealing a prior law authorizing the State to be sued, the court said: "Nor has the State court, in the judgment brought here for review, decided anything but a question of jurisdiction. It has given no decision in relation to the validity of the contract on which the suit is brought, nor the obligations it created, or the rights of parties under it."

These latter questions connot be raised in this proceeding unless the supposed *remedy formed a part of the obligation of the contract and is protected by the contract clause of the Federal Constitution*, and if, as we shall hereafter contend, the said "remedy," which the State Court held to have been taken away (and this we repeat was the *sole* point of decision) was not a "remedy" within the protection of the Federal Constitution, then no Federal question is presented in the record and there is nothing before this court which it can review.

Before discussing the subject further, we will first notice the contention of the plaintiff in error that there was error on the part of the State court in holding as a matter of construction that the recommendatory jurisdiction of the Supreme Court was repealed by the adoption of the constitutional amendment. This question we insist cannot be raised in this court, as it is well settled that:

II.

The construction and interpretation of a State Supreme Court of its own constitution and laws is binding upon this court and therefore unless some Federal question is involved the decision of the Supreme Court of North Carolina that the said constitutional amendment did deprive it of its recomendatory jurisdiction in this case is not the subject of review in this court.

The foregoing principle is so well established that it is hardly necessary to cite any authority in its support, but as the case of *De Saussure* v. *Gaillard*, 127 U. S., 216, is in some

respects similar to the case at bar, we will reproduce a part of the opinion bearing upon the subject. The court said: "Before reaching that question the Supreme Court (of South Carolina) had already decided that the action of the plaintiff could not be sustained according to the meaniug of the statute under which it was brought. The decision of that point was final and was fatal to the plaintiff's right of recovery. That question is not a Federal question; it does not arise under the Constitution of the United States or under any law or treaty made in pursuance thereof. It is not a question, therefore, which, under this writ of error, we have a right to review, *we are not authorized to inquire into the grounds and reasons upon which the Supreme Court proceeded in the construction of that statute.* It is a State Statute conferring certain rights upon suitors choosing to avail themselves of its provisions upon certain conditions in certain cases.

"Who may sue under it, and when and under what circumstances, are questions for the exclusive determination of State tribunals, whose judgment thereon is not subject to review by this Court. It was competent for the State of South Carolina either to grant or withhold the right to bring suits against the officers of the State for the recovery of money alleged to have been illegally exacted and wrongfully paid. If granted, the action is, in substance, though not in name, an action against the State itself, just as an action, permitted by the Act of Congress on the subject against a Collector of Customs for the recovery of duties alleged to have been illegally exacted, and paid under protest, is an action against the United States, though nominally against the Collector. In such cases, as the State may withhold all remedy, it may attach to the remedy it actually gives whatever conditions and limitations it chooses; and its own interpretation and application of its statutes on that subject, given by its own judicial tribunals, are conclusive upon the parties seeking the benefit of them."

DeSaussure *v.* Gaillard, 127 U. S., 216.

The foregoing principle being well established, it is plain that there is nothing to support the contention of the plaintiff that the State Court erred in its construction of the constitutional amendment referred to. As we have seen, in the absence of a federal element, no such question can be reviewed by this Court, and it must therefore necessarily follow that by reason of the construction put upon said amendment by the State Supreme Court, its jurisdiction has been taken away as to claims of this character. The Court, in *Horne* v. *State*, 84 N. C., 365, after a thorough examination of the question, concluded by saying: "We are of the opinion that the jurisdiction of this Court over the subject of this action has been taken away by the adoption of the amendment to the constitution, and that any recommendation we might make would be extra judicial."

III.

Under the construction of the State Court, the amendment, so far as this proceeding is concerned, should read substantially as follows: "The recommendatory jurisdiction conferred upon the Supreme Court under Section 9, Article IV, is hereby abrogated as to bonds issued by virtue of the Acts of Assembly of 1868," &c.

This is precisely what the Court held was the meaning of the amendment, so far as its jurisdiction was concerned. It is this, and only this, that it decided.

We submit that the point before the Court is whether the people of the State had the power to adopt such an amendment depriving the Court of its jurisdiction, and not whether the prohibition upon the Legislature to levy taxes to pay the bonds, unless authorized by a vote of the people, was a violation of the contract clause of the federal constitution. If, therefore, the State had the authority to adopt such an

amendment, that is, one which in express terms took away the jurisdiction (and this seems to be conceded as a general principle by counsel for plaintiff in error), then it is clear that it could accomplish the same result by using language which, as construed by its Supreme Court, implies the same meaning. So far, then, as the present argument is concerned, we must assume that the State has passed an amendment depriving its Supreme Court of jurisdiction as to claims like the plaintiff's, and, therefore, we respectfully insist that:

IV.

The real and only point before this court is whether it was competent for the State to withdraw its permission to be sued as provided by the clause conferring recommendatory jurisdiction upon its Supreme Court.

It will be observed that the jurisdiction conferred upon the Supreme Court by the said clause of the Constitution was simply "to hear claims against the State," and it was expressly provided that "its decisions shall be *merely recommendatory*," and that *no process in the nature of exenution shall issue theereon*," but that tney "*shall be reported to the next session of the General Assembly for its action.*" It was this "imperfect" remedy that the court decided had been taken from holders of claims like that of the plaintiff in error, and this we repeat was the only point decided by the State Supreme Court.

That such a recommendatory jurisdiction did not constitute a judicial remedy within the contract clause of the Federal Constitution is abundantly established by frequent decisions of this court. In 1838 the State of Tennessee established a bank for its own benefit and pledged its faith and credit to give idemnity for all losses arising from any deficiency in the funds specifically appropriated as capital. It was the sole stockholder and was entitled to all the profits of the business. By its charter, it was capable of suing and be-

ing sued. At that time the State Constitution provided that suits might be brought against the State in such manner and in such courts as the Legislature might direct. In 1855 it was enacted that "actions might be instituted against the State under the same rules and regulations that govern actions between private citizens, process being served on the district attorney of the district in which the suit was instituted.

No power was given the courts to enforce their judgments, and the money could only be got through an appropriation by the Legislature." This law was in force when the Memphis and Charleston R. R. Co., became a creditor of the bank, but the law was subsequently repealed. The railroad company sought to enforce the liability of the State under the indemnity clause of the charter. It was contended that the repeal of the *remedy existing at the time of the contract* was an impairment of its obligation, and therefore void under the provisions of the Federal constitution. This court held, however, (*Railroad Co.*, v. *Tennessee*, 101 U. S, 337) that the repealing act was valid and that the State of Tennessee could not be sued. The court said:

"The principle is elementary that a State cannot be sued in its own Courts without its consent. This is a privilege of sovereignty. * * * The remedy, which is protected by the contract clause of the Constitution, is something more than the privilege of having a claim adjudicated, mere judicial inquiry into the rights of parties is not enough. *There must be the power to enforce the results of such an inquiry, before there can be said to be a remedy which the Constitution deems part of a contract.* Inquiry is one thing, remedy another. Adjudication is of no value as a remedy, unless enforcement follows. It is of no practical importance that a right has been established, if the right is no more available afterwards than before. The Constitution preserves only such remedies as are required to *enforce* a contract. Here the State has consented to be sued only for the purposes of adjudication. The power of the Courts ended when the judgment was ren-

dered. In effect, all that has been done is to *give persons, holding claims against the State, the privilege of having them audited* by the Courts instead of some appropriate accounting officer. * * * It is needless to say that there is no remedy to enforce a contract, if performance is left to the will of him on whom the obligation to perform rests. A remedy is only wanted after entreaty is ended. Consequently that is not a remedy in the legal sense of the term, which can only be carried into effect by entreaty."

The above decision is on "all fours" with the present case. There, as in our case, the recommendatory jurisdiction existed at the time of the contract, and the Court distinctly held that such imperfect remedy was " not a remedy which the Constitution deems a part of a contract." No such state of facts is presented by this record, as that stated in the supposititious case put by the plaintiff's counsel, on pages 33 and 34 of his brief. No specific legal remedy was provided for the enforcement of the payment of these bonds, nor was there even any direction that the Legislature should levy taxes for their payment. Even had there been a provision in the law directing a special annual levy to pay the interest on the bonds, and such a law had been repealed and the taxes diverted to general State purposes, this Court would decline to declare such a repealing law unconstitutional and enforce the collection through the agency of the Auditor or other State officer. This was held in *North Carolina* v. *Temple*, 134 U. S., 22; *Hans* v. *Louisiana*, 234 U. S., 1, and other cases. In these decisions this Court strongly emphasized the principle of the immunity of a State from suit, and its absolute right to repeal or modify any remedy it may have given against itself, although *contemporaneous with the creation of the indebtedness.* These decisions are, it is submitted, so amply sufficient to meet the suggestion (for such only it seems to be) of the plaintiff's counsel, that the imperfect recommendatory remedy could not be taken away, because of its existence at the time of the issue of these bonds. We will refer,

however, to *Railroad Co.* v. *Alabama*, 101 U. S., 832, which would seem to settle this question beyond all controversy. The facts of the case were very similar to those in *R. R. Co.* v. *Tenn.*, *supra*, except that the remedy, existing at the time of the creation of the indebtedness, seems to have been more efficient, as the law provided that, "if judgment should be rendered against the State, it was the duty of the Comptroller, on the certificate of the Clerk of the Court, together with that of the Judge who tried the cause, that the reeovery was just, to issue his warrant for the amount, but no certificate could issue until six months after the recovery of the judgment. It was also the duty of the Treasurer to pay all warrants drawn on him by the Comptroller, under the authority of law." The Constitution at that time, and since, provided that no money should be drawn from the treasury but in consequence of appropriations made by law. Suit was commenced by the Railroad Company under the said law, but the law was repealed pending the suit. The same contention was made by the Railroad Company as now seems to be made by the plaintiff in error, that is, that the remedy given was a part of the contract, and its repeal was repugnant to the contract clause of the Federal Constitution. The Court dismissed the suit for want of jurisdiction, and this Court said:

"The Supreme Court affirmed this decision, and the question is, therefore, directly presented by this writ of error, whether the repealing statute is valid and constitutional as against this plaintiff in error, so far as it affects the present cause of action, which accrued while the right to sue existed.

"We are unable to see any substantial difference between this case and that of *Railroad Company* v. *Tennessee*, *supra*. Under both the Tennessee and Alabama statutes the Courts are made little else than auditing boards. If funds are not voluntarily provided to meet the judgment, the Courts are not invested with power to supply them. In Alabama, a warrant for the payment may be secured, but the State may

stop payment by withholding an appropriation. Perhaps the judgment creditor may take one step further towards the collection in Alabama than he can in Tennessee, but both States may refuse to pay, that is, may refuse to make the necessary appropriation, and the Courts are powerless to compel them to do so. In neither State has there been granted such a remedy for the enforcement of the contracts of the sovereignty as may not, under the Constitution of the United States, be taken away."

Railroad Co. *v.* Alabama, 101 U. S., 832.

To the same effect are *Beers* v. *Arkansas*, 20 How., 527; *In re* Ayres, 123 U. S., 443, and cases therein cited.

In the last-mentioned case the Court said: "It cannot be doubted that the 11th Amendment to the Constitution operates to create an important distinction between contracts of a State with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of the obligation. *Louisiana* v. *New Orleans*, 102 U. S., 203. That obligation, by virtue of the provisions of Article I, Section 10, of the Constitution of the United States, cannot be impaired by any subsequent State legislation. Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement. It is different with contracts between individuals and a State. In respect to these, by virtue of the 11th Amendment to the Constitution, there being no remedy by suit against the State the contract is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to corcion. Although the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subse-

quently withdraw that consent and resume its original immunity, without any violation of the obligation of its contract in the constitutional sense. *Beers* v. *Arkansas*, 20 How., 527; *Railroad* v. *Tennessee*, 101 U. S., 337."

These authorities, we respectfully submit, sustain the propositions:

1. That the construction placed by the State Court upon the amendment, to the effect that it had taken away the recommendatory jurisdiction of the State Supreme Court, is binding upon this tribunal, unless some Federal question is involved.

2. That no Federal question is involved, because the said imperfect remedy is no part of the obligation of the contract, as contemplated by the Federal Constitution, and can be withdrawn whenever the State deems it proper to do so.

In view of these considerations, the defendant in error respectfully insists that this Court should not undertake to pass upon the validity of the amendment in respect to its prohibition upon the political department of the State government to provide by taxation for the payment of bonds of the character sued upon. As we have heretofore said, the State Court only decided that it had been deprived of jurisdiction by its construction of the said amendment. The State, undoubtedly, had a right to adopt an amendment of that character; that is, one taking away its recommendatory jurisdiction, and its highest Court has said that such is the meaning and effect of the amendment adopted. The *result* of its decision is simply to deny its jurisdiction to *audit* the plaintiff's alleged claim, and it is the actual legal and practical results as affecting the jurisdiction of the State Court, and that alone, which this Court can review.

V.

If, however, the validity of the amendment to the State Constitution can be passed upon in this indirect manner, as is contended by the plaintiff in error, we submit that the said amendment contains no provision which impairs the contract embraced within its terms.

We have seen that the State had provided no remedy for the enforcement of the payment of these bonds. It is also perfectly clear that before the adoption of the amendment there was no power either in the State or Federal courts to compel the Legislature to provide for their payment. It was a question resting entirely with the political part of the State government, and it has never been suggested by this or any other court, that it can compel a State Legislature to levy taxes for the payment of its indebtedness. No such interference with the power of a State to exercise its own discretion in respect to such grave political duties as levying taxes and otherwise regulating its internal finances, was ever contemplated by the Constitution and such a doctrine has never received the slightest countenance of this court. *In re* Ayres, *supra*. The only privilege the plaintiff in error had before the adoption of the said amendment was, as is said in *Beers* v. *Arkansas, supra*, the right to entreat the Legislature. "It is needless to say that there is no remedy to enforce a contract, if performance is left to the will of him on whom the obligation to perform rests. A remedy is only wanted after entreaty is ended; consequently that is not a remedy in the legal sense of the term, which can only be carried into effect by entreaty." It was entirely competent for the people through their Legislature to deny any appropriation, and there can be no reason why the people cannot make such denial permanent by inserting it in their Constitution, or as was done in this instance, by denying by the amendment the right to make any appropriation unless the question be

first submitted to a vote of the people. This right to entreat the Legislature forms no part of the obligation of the contract within the meaning of the Federal Constitution. The only contracts protected by the Federal Constitution are those contracts which can be *enforced*, and as there existed no means whatever, by which the plaintiff's claim could have been enforced, it must follow that there was no "obligation" which can be made the subject of Federal inquiry.

In *Edwards* v. *Kearsey*, 96 U. S., 595, this Court said: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfilment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing.' 1 Bac. Abr., tit. Actions in General, letter B."

This language was quoted by Mr. Justice Miller in his Lectures on the Constitution (p. 540) in discussing the contract clause; and he adds:

"So far as the law is concerned, the obligation of a contract is the means by which the law enforces a legal duty, and it is that with which the law and the Constitution deals. In this sense, the obligation of a contract consists in the authority or power which the law gives to enforce its performance, or to give a remedy for its non-performance.

"The next thing in proper sequence to consider is what it is to 'impair' this obligation, which is at once the means and the remedy given by the law to compel a man to perform his contract, or in case of failure forces him to make proper compensation in damages. It follows that to impair this obligation by a State law is in some way to weaken or diminish the power which the Courts had when the contract was made to enforce it, if enforceable specifically, or to give remedy by damages for failure to perform it."

To the same effect is the language of Mr. Justice Field in *Louisiana* v. *New Orleans*, 102, U. S., 203:

"The obligation of a contract, in the *constitutional sense*, is the means provided by law by which it can be enforced * * * by which the parties can be obliged *to perform it.*"

In Cooley's Constitutional Limitations, it is said:

"*The obligation of a contract*, it is said, consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force."

In Hare's Am. Const. Law (675) it is said:

"Three elements enter into the obligation of a contract, * * * the contract, the command of the law that it shall be fulfilled, and the remedy which renders the command obligatory, and without which it would be empty form. There must not only be an agreement which the parties are morally bound to perform, but the Courts must recognize the duty as one which can be reduced to judgment; and finally there must be some sufficient means of carrying the judgment into effect."

In *VonHoffman* v. *Quincy*, 4 Wall., 535, the Court said: "Without the remedy the contract may indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against invasion.

"The obligation of a contract is the law which binds the parties to perform their agreement. *Sturges* v. *Crowinshield*, 4 Wheaton, 122."

See also:

Black's Const. Law, 524.
Wolf *v.* New Orleans, 13 Otto, 358.
3 Am. & Eng. Ecy., 825.
Pomeroy on Const., 588.
2 Story Const., 1392.
Ogden *v.* Saunders, 12 Wheat., 518.
Dartmouth College *v.* Woodard, 4 Wheat., 518.
Walker *v.* Whitaker, 16 Wall., 3.4.

These authorities (and many others that could be cited) we think fully sustain our contention that the obligation, protected by the Federal Constitution, is a legal obligation, the performance of which can be enforced, or compensation recovered for its non-performance. In every case we have found the Courts recognized that it is the civil or legal obligation alone that is protected. In Dartmouth College case, *supra*, Marshall, C. J., says: "This provision never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights *which may be asserted in a Court of justice.* In all subsequent cases the Court has either tacitly or expressly held that the means of enforcement were absolutely essential to bring a contract within the constitutional provision. The contract under consideration clearly belongs to that class of "imperfect obligations" mentioned in *Edwards* v. *Kearsey*, *supra*, and other authorities above cited. There are not now, and have never been, any means of enforcing, that is, compelling performance by the State. Legal enforcement means enforcement by and through the Courts, but the State is not amenable to the Courts. As the State has no political superior, there can no where be any superior external force which can

be exerted to compel her by means of legal process. The "faith and credit of the State" are what was "pledged." No particular fund was provided for the payment of these bonds; no officers amenable to the compulsion of the Courts, or any other power, were charged with the fulfilment of these obligations. For such a pledge, the remedy is wholly a moral one. "Those who deal in the bonds and obligations of a sovereign State are aware that they must rely altogether on the sense of justice and good faith of the State." *Bank of Washington* v. *Arkansas*, 20 How., 530. Such executory contracts of a State have no other than a moral sanction, and depend on good faith of the State for performance. *In re Ayers, supra.* No money can be drawn without an appropriation, and no power can compel the Legislature to make one. *Railroad Company* v. *Alabama, supra.* We insist, therefore, that there was no obligation "within the contract clause of the Federal Constitution" in existence at the time of the adoption of the amendment; and if this be so, it must follow that the amendment is not obnoxious to that provision of the Federal Constitution. If there can be no "obligation" within the protection of the above provision, unless the contract is one enforceable by the Courts, then the argument of plaintiff's counsel, based upon expressions quoted from opinions of this Court, in the course of discussion, from which it may be inferred that an obligation may exist without remedy to enforce it, can have nothing to support it.

In view of the numerous decisions in which the word " obligation," in the contract clause of the Federal Constitution is expressly defined, such expressions must be regarded as referring to those " imperfect obligations," which are not within the said provision. An obligation may be " imperfect," as against a State, when no enforceable direct remedy against the State exists, and yet be regarded as perfect and inviolable when it is incidentally involved in suits between parties over whom the Courts have jurisdiction, and also in cases against a State (as in *Hall* v. *Wisconsin*, 103 U. S., 5), where the State submitted to the jurisdiction of the Courts.

What was said in *Poindexter* v. *Greenhow*, 114 U. S., 270, cited

by counsel for plaintiff in error, very plainly means nothing more than this. The same may be said of *Hans* v. *Lousiana*, 134 U. S., 1; Virginia Coupon Cases, 102 U S., 270; *Murray* v. *Charleston*, 96 U. S., 432; and other cases cited upon this point by plaintiff's counsel. They go no further than what is said in *Poindexter* v. *Greenhow*, *supra*, "that whenever in a controversy between parties to a suit, of which these Courts have jurisdiction, the question arises upon the validity of a law by a State impairing the obligation of its contract, the jurisdiction is not thereby ousted, but must be exercised with whatever legal consequences to the rights of the litigants may be the result of the determination."

No case can be found in which it has been decided that the mere naked promise of the State to pay money is such an "obligation" within the Federal Constitution, as inhibits it from declaring that no taxes shall be levied or appropriated for its payment, except in such manner and upon such conditions as it may prescribe. This is all that was done by the State in this instance. There existed no provision compelling the Legislature to pay the plaintiff's debt; there were no means by which judgment could be enforced; and all that the plaintiff could rely upon was, as has been said by this Court, "the good faith of the State." In prescribing by the amendment the new conditions upon which the Legislature could provide for the payment of these bonds, we respectfully insist that no obligation within the contract clause of the Federal Constitution was impaired. There was no such "obligation," and, therefore, none to impair.

We will add that, even if any such obligation existed, the amendment would not have been invalid, because the right to entreat the Legislature to pass a law providing for the payment of these bonds is not abridged. The power to pass such a law still exists, but it must first be approved by a vote of the people.

A State, by contracting a debt, does not thereby deprive itself of the right to alter the mode in which her laws are enacted. All the bond holders can claim that they possessed was a right to have a law enacted.

If the amendment interferes with that right, because of the requirement that such a law be submitted to the people, and because that branch of the law-making power may not concur with the others, the same objection could be made to any amendment changing the mode of enacting laws. Such, for instance, as an amendment giving the Governor a veto power, not possessed by him when the bonds were issued, or requiring a two-thirds instead of a majority vote to pass a bill in the first instance, or requiring a three-fourths instead of a two thirds vote to pass a bill over a veto. None of these changes would interfere with the bond-holders' "remedy," and all of them are within the unquestionable power of the State to regulate the manner of enacting laws. The bond-holders still have the faith and credit of the State, and if the people wish to pay these bonds, they may do so. If not they simply, as one party to the contract, refuse to perform according to the letter. And if there is any breach of the faith and credit of the State, it would be in that refusal and not in the constitutional amendment. The Legislature is the mere agent of the people to express their will, and is bound to conform its action to the will of its principal, and if the amendment violates the Federal Constitution, it does so merely by denying to the servant or agent the power to disregard the sovereign will of the people, who are the State. The complaint is that the amendment secures to the State the right to express its sovereign will; but that is strictly in accordance with the contract. The bond-holders are entitled to nothing else than the will of the people of the State, and the State has the right to see to it that it should not be misrepresented by its agent, and to maintain the contrary, is to maintain that the agent shall have the right to do wrong.

Respectfully submitted,

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No. 52.

Supreme Court of the United States,

OCTOBER TERM, 1895.

HERMANN R. BALTZER AND WILLIAM G. TAAKS, Plaintiffs in Error,

vs.

THE STATE OF NORTH CAROLINA, Defendant in Error.

BRIEF OF

F. I. OSBORNE,
(Att'y Gen'l of N. C.),
JAMES E. SHEPHERD,
CHARLES M. BUSBEE,
Counsel for Defendant in Error.

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OCTOBER TERM, 1895.

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vs.
THE STATE OF NORTH CAROLINA, Defendant in Error.
No. 52.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

This was a proceeding instituted by the plaintiffs in error against the defendant in error, in the Supreme Court of North Carolina, under the provisions of the Code of North Carolina, sections 947, 948 (Constitution, Art. IV, section 9). The alleged cause of action was as follows:

Under an act of the General Assembly of North Carolina, enacted at its special session of 1868, the State issued its bonds to the amount of $2,000,000 and delivered the same to the Chatham Railroad Company upon the said company, under the terms of the act, depositing with the State Treasurer its bonds for a like amount The act provided that the company might at any time discharge its bonds so deposited with the State Treasurer by substituting in lieu thereof coupon bonds of said State, or other indebtedness of the State, or payment in national currency.

The said company used a portion ($297,000) of the State bonds received by it as aforesaid in the purchase of iron

rails for its road, of which said bonds the plaintiffs in error now hold a portion.

The company afterwards desiring to take up its bonds under the option granted it in the act, delivered to the State Treasurer all the bonds received by the company from the State except the said $297,000; and in lieu of them obtained other State bonds, alleged by plaintiffs in error to be valid bonds, which were delivered to the State Treasurer, and all the bonds of the company held by the State were re-delivered to the company.

The bonds so received by the State were destroyed under resolution of the General Assembly on the 20th March, 1875.

Upon the hearing of the proceeding in the Supreme Court of North Carolina the defendant in error submitted a motion to dismiss the action for want of jurisdiction in the Court, which motion was allowed, as set out in the record.

BRIEF OF ARGUMENT.

I.

The jurisdiction of the Supreme Court of North Carolina in respect to this action is a jurisdiction merely for the purpose of recommending to the General Assembly the payment of any claim against the State considered and approved by the Court. The provision of the Constitution conferring the jurisdiction is as follows:

"The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action."

The contention of the plaintiffs, in order to give this Court jurisdiction, is that the Supreme Court of North

Carolina in dismissing the action necessarily decided a Federal question, to-wit, that the section of the Constitution of North Carolina prohibiting the General Assembly from paying certain bonds was not in conflict with that section of the Federal Constitution which prohibits the State from passing any law which impairs the obligation of a contract.

This constitutional provision was adopted by a vote of the people in 1875, and is as follows:

"Nor shall the General Assembly assume or pay, or authorize the collection of any tax to pay, either directly or indirectly, express or implied, any debt or bond incurred or issued by authority of the Convention of the year 1868, nor any debt or bond incurred or issued by the Legislature of the year 1868, either at its special session of the year 1868 or at its regular sessions of the years 1868–'69, 1869–'70, except the bonds issued to fund the interest on the old debt of the State, unless the proposing to pay the same shall have first been submitted to the people and by them ratified by the vote of a majority of all the qualified voters of the State, at a regular election held for that purpose."

The argument of the defendant in error in regard to this point is fully set out in brief filed in the case of *Baltzer* v. *The State*, at this term, and to be argued together with this case.

The Supreme Court of North Carolina simply declared that as the General Assembly was prohibited from assuming or paying the bonds held by plaintiffs in error (and admittedly invalid, as we shall hereafter show), it would be a vain thing for the Court to entertain an action asking a recommendation from the Court that the General Assembly pay a claim which the Constitution said it should not pay.

This Court will dismiss a case brought here on writ of error to a State Court, unless it appear affirmatively, not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause. *Eustis* v. *Bolles*, 150 U. S., 361; *Cook Co.* v. *Canal Co.*, 138 U. S., 635.

In the case at bar the Supreme Court of North Carolina did not pass upon the question as to whether or not the provision of the North Carolina Constitution in controversy was in conflict with the contract clause of the Constitution of the United States. The decision was simply that the Court would not assume to exercise its discretionary, recommendatory jurisdiction, because it would be vain and useless for it so to do. The action of the Court, under the authorities cited, was conclusive, and is not subject to review in this Court.

II.

But the remedy protected by the Constitution of the United States is not such a remedy as the plaintiffs in error are seeking to assert in this case. That constitutional provision does not apply where the only remedy attainable is a mere inquiry and recommendation. This is specifically decided in the case of *R. R. Co.* v. *Tennessee*, 101 U. S., 337, where it is declared that the protected remedy must be something more than a mere judicial inquiry into the rights of the parties, and must carry with it as an essential constituent the power of enforcement.

Under the law of North Carolina conferring upon its Supreme Court the limited recommendatory jurisdiction granted, the authority of the Court does not extend so far as the authority of the Tennessee Court extended. There at least a judgment could be entered against the State. Under the North Carolina law the Court had no power to

enter any judgment or decree against the State. It had jurisdiction merely to recommend or suggest to the General Assembly that the claimant be paid so much. It had no jurisdiction to adjudge anything, much less to validate or enforce its judgment. Its action or recommendation would not even establish a right as to the claimant. It is historical knowledge in North Carolina that the General Assembly has not even regarded the recommendatory communications from the Court as in any way binding upon the legislative conscience or the legislative action. The Court has not even the power of a board of audit. In respect to its authority in the premises it acts simply as a committee of investigation and inquiry which reports its findings to the legislative power, which adopts or modifies or disclaims them at its pleasure.

III.

It is axiomatic law, as set out in the brief in the case of Baltzer *vs.* The State, No. 93, that a State can be sued in its own courts only by its own consent.

The provision of the State Constitution in controversy, prohibiting the payment of certain alleged bonds therein mentioned, is, in effect, if not in terms, an absolute prohibition upon its courts from entertaining any action or proceeding upon such bonds under the general authority of the law authorizing suits against the State. When the Constitution declares that its Legislature shall not asssume or pay or provide for the payment of certain bonds, it is a declaration that the State does not assent that any suit or proceeding may be brought against it, the purpose of which is to enforce the payment of such bonds, and unless such assent undoubtedly exists the sovereignty of the State protects it from such suit. It has been so construed in *Horne* v. *State*, 84 N. C., 362.

IV.

But in this case the plaintiffs in error come into the Supreme Court of North Carolina and ask the Court to inquire into and adjudicate a claim based upon an alleged obligation of the State which they admit to be invalid and void.

Section VIII of the complaint of the plaintiffs in error alleges "that said plaintiffs, before receiving the said 150 high numbered bonds, had negotiated a sale for them, but that before the said sale could be closed this issue of bonds was declared by the Stock Exchange of New York (where they had been listed as marketable bonds) to be unconstitutional and void, and the bonds were stricken from the list of marketable bonds, and that the State of North Carolina has refused, and still does refuse, to recognize the validity of said bonds."

Section X of the complaint alleges "that immediately upon said decision and declaration by the New York Stock Exchange, said plaintiffs notified said Pickrell, Hawkins and Whitford that the said one hundred and fifty bonds were worthless," etc.

And the answer of defendant in error alleges:

"VIII. Answering the allegations contained in paragraph VIII, the defendant admits and re-affirms that said bonds were and are unconstitutional and void, and that the defendant refuses to recognize their validity," etc.

And such was the position assumed by the plaintiffs upon the hearing of this cause before the Supreme Court of North Carolina. It was there conceded by them that the bonds in question were void and constituted no obligation of the State, and the plaintiffs endeavored only to assert their alleged equitable claim against the defendant. In the statement of facts, found in the opinion of the Court below, it is recited:

"Afterwards, in the course of business, the plaintiffs "became the owners of one hundred and forty of the State "bonds so issued, receiving the same from a party who "bought from them the iron for the railroad of the railroad "company mentioned, which iron was placed upon the "road. *It is conceded that these bonds and all the State bonds "so issued were unwarranted by the Constitution of this State, "and are void.*" Record, page 37.

And, again, the opinion recites:

"It was properly conceded that what purported to be two "thousand bonds of the State, each of the denomination of "one thousand dollars, issued and delivered to the Chatham "Railroad Company, were nullities and of themselves cre-"ated no obligation upon the State to pay them, and that "they come within the inhibition clause of the Constitu-"tion mentioned. They are, *therefore*, not within the juris-"diction of the Court."

"The plaintiffs in the course of business took and have "one hundred and forty of such bonds, representing one "hundred and forty thousand dollars, and the interest due "thereon. Their claim, however, as they contend, is not "founded directly, if at all, upon them, but they contend "that they were entitled in equity to have the money they "represent paid to them out of the proceeds of the sale of "the first-mortgage bonds of the railroad company de-"posited with the State to indemnify it against loss if it "should have to pay the *invalid bonds.*" Record, page 39.

And, again, the Court say:

"It is no sufficient answer to what has been said to say "that the plaintiffs do not ask the State to pay its invalid "bonds held by them." Record, page 41.

So that the action of the plaintiffs is grounded upon their allegation that the bonds in controversy are not the bonds of the defendant, but are void.

There can be no infringement of the Federal Constitution resulting from the law of a State prohibiting the payment or assumption by the legislative authority of an alleged bond of the State which is admitted to be invalid and void. It requires no argument to sustain the proposition that a State can, by constitutional enactment, declare that its Legislature shall make no provision for the payment of its void and unconstitutional bonds. No law of a State can "impair the obligation" of an invalid bond.

V.

But the plaintiffs in error contend that they are entitled to use the ownership by them of such invalid bonds as a basis for their action against the State (under the law conferring jurisdiction upon its Supreme Court) to assert an alleged equitable right of subrogation, as set out in the pleadings.

Whether that be so or not, it is not within the jurisdiction of this Court to inquire. The brief of the plaintiffs in error argues at length the equitable claim of the plaintiffs and then admits that such argument has no place in the discussion before this Court.

"We have shown, therefore, that the equities of the case "are decidedly on the side of the plaintiffs, although for the "purposes of the motion made in the State Court to dismiss "for lack of jurisdiction, the question of such equities was "not properly involved at all." Brief of plaintiffs in error, page 31.

We do not conceive that it is necessary or proper to discuss the merits of the alleged equitable claim of the plaintiffs in error. The Supreme Court of North Carolina did not consider it.

"We express no opinion as to the correctness of this con-"tention of the plaintiffs." Opinion of Court, record, page 39, bottom.

And if the Court had considered and adjudicated it, their decision would not have been reviewable in this Court on writ of error, for the reason that no Federal question would have been involved in such decision.

Of course we do not concede that in any view of the case the plaintiffs have any rights against the defendant enforceable in equity. We think the contrary true. We simply say that no questions of such nature are presented by this appeal.

VI.

To entitle the plaintiffs in error to have the decision of the Supreme Court of North Carolina reviewed in this Court "it must appear affirmatively not only that a Federal question was presented for decision, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it." *Blount* v. *Walker*, 134 U. S., 607.

In the case cited the donee of a power given under a will executed and probated in South Carolina undertook, by a will executed in North Carolina, to devise real property in South Carolina in execution of the power. The latter will was executed and probated according to the law of North Carolina, but not according to the law of South Carolina, and the South Carolina Court held, after admitting the will to probate in South Carolina upon an exemplified copy, that the donor of the power intended that it should be executed by a will valid under the law of South Carolina. It was claimed that a Federal question was involved because the South Carolina Court did not give full faith and credit to the judgment of the North Carolina Court. But this Court said: "Not so. If we were to reverse the decision of the Supreme Court of South Carolina we should do so upon the ground that that Court erred

in the construction of Mrs. Harris' will and not upon any ground connected with the judgment of the probate Court in North Carolina."

In the case at bar if the judgment of the Supreme Court of North Carolina is overruled it will be because that Court did not sustain the alleged equitable claim of the plaintiffs in error against the State, and not because the Court refused to adjudge that the cause of action of the plaintiffs in error was within its jurisdiction under the law of the State regulating and limiting the same.

The defendant in error submits that no Federal question was involved in the decision of the Supreme Court of North Carolina as to its own jurisdiction, and that such decision is not reviewable in this Court, and that the writ of error herein should be dismissed.

Respectfully submitted,

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